IN THE

Supreme Court of the United States

October Term, 1976

No. .....

76-1023

FRANCHISE REALTY INTERSTATE CORPORATION and McDONALD'S SYSTEMS OF CALIFORNIA, INC.,

Plaintiffs-Appellants,

vs.

SAN FRANCISCO LOCAL JOINT EXECUTIVE BOARD OF CULINARY WORKERS, BARTENDERS AND HOTEL, MOTEL AND CLUB SERVICE WORKERS, an unincorporated association, GOLDEN GATE RESTAURANT ASSOCIATION, a corporation, and HOTEL EMPLOYERS ASSOCIATION OF SAN FRANCISCO, a corporation,

Defendants-Appellees.

PETITION FOR WRIT OF CERTIORARI.

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Petitioners Franchise Realty Interstate Corporation and McDonald's Systems of California, Inc., plaintiffs below, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered September 17, 1976, and reported at 542 F.2d 1076 (Appendix A), which affirmed the judgment of the United States District Court for the Northern District of California entered May 8, 1973 (Appendix B), granting defendants' motion to dismiss the complaint on the ground that the conduct alleged in the complaint to violate

Section 1 of the Sherman Act, 15 U.S.C. § 1, was immune from antitrust scrutiny under the First Amendment, and which also affirmed the order of the same District Court, entered June 1, 1973 (Appendix C), denying plaintiffs' motion to set aside the judgment and for leave to file an amended complaint.

Jurisdiction.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The judgment of the Court of Appeals was entered September 17, 1976. Petitioners' Petition for Rehearing and Suggestion for Rehearing In Banc was denied November 2, 1976 (Appendix D). This petition is being filed within 90 days of the aforesaid date of November 2, 1976.

Questions Presented.

1. Whether concerted attempts to injure a business rival by abusing the adjudicatory process, with the aim of denying the victim meaningful access to the process, or of directly impairing the victim's competitive position by burdening him with repetitious and baseless litigation, are immune from attack under Section 1 of the Sherman Act, 15 U.S.C. § 1, unless the attempts consist of or are accompanied by conduct external to the adjudicatory process.

2. Whether a special pleading standard, which departs radically from existing standards by requiring much more detailed and specific factual allegations than are called for under the notice pleading requirements of Rules 8 and 12 of the Federal Rules of Civil Procedure, applies in any action in which relief is sought for "conduct which is prima facie protected by the First Amendment."

Statutes Involved.

The Circuit Court below ruled that the activities alleged were immune from Section 1 of the Sherman Act, 15 U.S.C. § 1, which provides in pertinent part:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . ." July 2, 1890, c. 647, § 1, 26 Stat. 209; August 17, 1937, c. 690, Title VIII, 50 Stat. 693; July 7, 1955, c. 281, 69 Stat. 282.

Also at issue is the Court's decision to deviate from the liberal pleading requirements of Rules 8(a)(2), 8(f), and 12(b)(6) of the Federal Rules of Civil Procedure, which provide in pertinent part:

> Rule 8. "(a) *Claims for Relief.* A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain . . . (2) a short and plain statement of the claim showing that the pleader is entitled to relief. . . .
>
> * * *
>
> "(f) *Construction of Pleadings.* All pleadings shall be so construed as to do substantial justice."
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> Rule 12. "Defenses and Objections. . . .
>
> ". . .
>
> "(b) *How Presented.* Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the

pleader be made by motion: . . . (6) failure to state a claim upon which relief can be granted. . . ."

Statement of the Case.

A. The Nature of the Case.

Petitioners Franchise Realty Interstate Corporation ("FRIC") and McDonald's Systems of California, Inc. are two subsidiaries of McDonald's Corporation, which through its subsidiaries operates and licenses others to operate family-style restaurants under the name of McDonald's throughout the United States. FRIC is the corporate subsidiary through which McDonald's Corporation secures sites for the building of restaurants. McDonald's Systems of California, Inc. is principally engaged in the business of licensing McDonald's restaurants in the State of California.

In 1973, FRIC and McDonald's Systems of California, Inc. (hereinafter referred to jointly as "the Company") commenced this federal antitrust action in the United States District Court for the Northern District of California, alleging that respondents, two associations of restaurant and hotel employers and a labor union, had engaged in a conspiracy to restrain trade and commerce in violation of Section 1 of the Sherman Act (15 U.S.C. § 1). The thrust of the Company's complaint (annexed hereto as Appendix E) was that respondents (defendants below) had taken concerted action aimed at eliminating McDonald's restaurants as a competitive factor in the restaurant business in the City of San Francisco.

The issues in this case revolve around the legal sufficiency of the allegations in the Company's complaint. The complaint alleged that the reputation of

McDonald's restaurants for serving high quality food at low prices in a congenial family atmosphere (no liquor is served and there are no cigarette vending machines) has contributed to an ever-increasing demand for McDonald's products and locations (App. E, para. 6), and that competing restaurants in San Francisco have evidenced concern about McDonald's expanding business (*id.* para. 9). The complaint alleged that in 1971 the Company, which operates two restaurants in San Francisco (*id.* para. 10), applied for licenses for the operation of three more restaurants, and that such licenses were granted by the San Francisco Department of Public Works, which certified that in each instance the proposed restaurant would comply with all of the applicable city and county laws, codes, ordinances, and regulations. (*Id.* paras. 11-12.)

The complaint went on to allege that the defendants, acting in bad faith and with the purpose of insulating restaurant operators in San Francisco from the competition of McDonald's restaurants (*id.* para. 17), "induced and persuaded" the San Francisco Board of Permit Appeals to overrule the issuance of the permits. (*Id.* para. 13.) It was alleged that defendants, with the intent of foreclosing the Company "from free and unlimited access" to the Board of Permit Appeals (*id.* para. 17), had acted in concert to "oppose each and every permit" granted to the Company (*id.* para. 16(a)), and that the Board's actions were procured through this "consistent, repeated and baseless opposition." (*Id.* para. 17.) The opposition was alleged to be baseless because "each defendant knew . . . that the Company had intended to and did comply with all of the necessary code requirements . . . and that the Board of Permit Appeals of the City and County of San Francisco

had absolutely no authority, right, duty or responsibility to act as an economic board of review with the power to determine who and on what terms competition shall exist within the confines of San Francisco." (*Id.* para. 18.) Thus, each defendant knew "that by its plan of systematic, indiscriminate and wanton attack on the Company it was inducing, if not acting in concert with the Board of Permit Appeals (other than its President), to subvert the constitutional function of that Board . . ." (*Id.*)

The Company alleged further (in a proposed second amended complaint pertinent parts of which are annexed hereto as Appendix F) that defendants had secretly sponsored the appearances before the Board of ostensibly disinterested witnesses (App. F, para. 17(b)), and that defendants had maliciously instigated and sponsored (sometimes secretly) proceedings against McDonald's before other adjudicatory bodies, including the Human Rights and Labor Law Enforcement Commissions (*id.* para. 17(e)). Finally, the Company alleged that defendants had engaged in several activities that were not directed at governmental bodies at all, but rather were intended to inflict direct business injury on McDonald's; these activities included the dissemination of malicious and false statements through the news media designed to arouse public wrath against McDonald's, the harassment of customers at existing McDonald's restaurants, and the disruption, accompanied by illegal picketing, of essential supplies to existing McDonald's restaurants. (*Id.*)

B. Proceedings in the District Court.

The Company's complaint was filed on January 3, 1973. On February 26, 1973 the Company, pursuant

to a stipulation, filed an amended complaint which corrected an error in the naming of the parties defendant, but did not substantively modify the original pleading. Defendants then moved, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, to dismiss the amended complaint for failure to state a claim. After memoranda were submitted and oral argument was heard, the District Court on May 8, 1973 filed a Memorandum of Opinion granting defendants' motion to dismiss without leave to amend on the ground that the acts alleged in the complaint were protected from antitrust scrutiny under the First Amendment. On May 14 and 22, 1973, judgments were entered in favor of defendants.

The Company thereupon submitted a Motion to Set Aside the Judgment and for Leave to File a Second Amended Complaint. The District Court on June 1, 1973, following oral argument, denied this motion, whereupon the Company filed a Notice of Appeal to the Ninth Circuit.

C. Proceedings in the Court of Appeals.

The Ninth Circuit, by a two to one margin, affirmed the District Court's dismissal of the complaint and its denial of leave to file the second amended complaint. The Court asserted, 542 F.2d at 1079-80, 1086, that the complaints alleged nothing more than efforts on the part of defendants to influence public officials to take governmental action, and that such efforts were insulated from antitrust liability by the doctrine of *Eastern Railroad Presidents Conf. v. Noerr Motor Freight,* 365 U.S. 127 (1961). The Court ruled that the allegations did not invoke the *Noerr* "sham exception" for conduct ostensibly directed toward influencing

governmental action which is actually aimed at directly interfering with the business relationships of a competitor (see 365 U.S. at 144), because that exception "is limited to situations where the defendant is not seeking official action by a governmental body. . . ." 542 F.2d at 1081.

The Court held further that the complaints did not state a cause of action under *California Motor Transport Co. v. Trucking Unlimited,* 404 U.S. 508 (1972), and *Otter Tail Power Co. v. United States,* 410 U.S. 366 (1973). Those cases, elaborating on the meaning of the *Noerr* sham exception in the context of administrative or judicial proceedings, held that there is no antitrust immunity for efforts to bar competitors from meaningful access to adjudicatory tribunals or for efforts to injure competitors by abusing the adjudicatory process. See *Trucking Unlimited,* 404 U.S. at 512-13; *Otter Tail,* 410 U.S. at 380. The Court held that these cases withheld the *Noerr* immunity only from activities external to the adjudicatory process which are aimed at completely foreclosing a competitor's access to that process, 542 F.2d at 1081 & n. 4.

Among the external activities cited by the Court as evidence of an intent to completely foreclose access are widespread publicity by defendants of a campaign to oppose every effort by a competitor to avail himself of the adjudicatory process, or the communication directly to the competitor of threats to carry out such a plan of expensive and time-consuming opposition. *Id.* It is unclear whether in the Court's view these

activities must succeed in depriving the victim of access to the adjudicatory process, as the Court seems to imply when it observes that "[n]owhere is it alleged that McDonald's was prevented from applying for permits, or from having a hearing before the Board." *Id.* at 1079. It is certain, however, that in the Court's view concerted activity that abuses the adjudicatory process for an anticompetitive purpose, but that is unaccompanied by activities external to the process that are aimed at denying access to it, does not violate the Sherman Act.

Since the Company's complaint alleged that defendants had agreed on a plan "to foreclose the Company from free and unlimited access" to the Board (App. E, para. 17), the Court recognized that under the notice pleading requirements of the Federal Rules of Civil Procedure the omission of specific references to the external access-barring activities demanded by the Court's substantive standard would not ordinarily justify dismissal at the pleading stage, but rather might await the results of discovery. *See* 542 F.2d at 1082. The allegations in the proposed second amended complaint that defendants had engaged in a malicious publicity campaign and had harassed McDonald's customers and disrupted McDonald's restaurant deliveries (App. F, para. 17(e)) might also await factual supplementation at a later stage. But the Court, summarily dismissing both sets of allegations as "conclusory" (542 F.2d at 1082, 1085), affirmed the dismissal of the complaint and the denial of leave to file the proposed second

amended complaint on the ground that a special and unprecedented pleading rule must be applied to safeguard the First Amendment right to petition a governmental body. The Court defined this special pleading rule very broadly:

> "What we . . . hold is that in any case, whether antitrust or something else, where a plaintiff seeks damages or injunctive relief, or both, for conduct which is prima facie protected by the First Amendment, the danger that the mere pendency of the action will chill the exercise of First Amendment rights requires more specific allegations than would otherwise be required." 542 F.2d at 1082-83.

Chief Judge Browning vigorously dissented from the majority's result, alleging that in order to reach its result the majority had distorted the substantive rule applied in two recent Supreme Court decisions, and had created "an unwarranted exception to the standard for pleading laid down in the Federal Rules of Civil Procedure and forcefully restated in *Conley v. Gibson*, 355 U.S. 41, 45-48, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)." 542 F.2d at 1086-87.

REASONS FOR GRANTING WRIT.

I

The Majority's Ruling That Concerted Efforts to Injure a Competitor by Abusing the Adjudicatory Process, With the Aim of Denying the Competitor Meaningful Access to the Process, Are Immune From the Sanctions of the Antitrust Laws Unless Accompanied by Conduct External to the Adjudicatory Process, Flatly Contradicts Two Decisions of This Court and Decisions of Other Circuits, and Constitutes a Serious Misreading of the Sherman Act That Would Shelter Wholly Unmeritorious Schemes to Eliminate or Exclude a Competitor.

It has long been established that joint collaborative action to eliminate or exclude a competitor is so unduly restrictive of competition as to constitute a *per se* violation of Section 1 of the Sherman Act. *United States v. General Motors Corp.*, 384 U.S. 127 (1966); *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959). An exception to this rule was carved out in *Eastern Railroad Presidents Conf. v. Noerr Motor Freight*, 365 U.S. 127 (1961), which held that a lobbying effort and publicity campaign by a group of railroads aimed at bringing about the passage of legislation restricting the trucking industry was immune from Sherman Act sanction. Stressing that "no violation of the Act can be predicated upon mere attempts to influence the passage or enforcement of laws," *id.* at 135, the Court reasoned that a contrary construction of the Act would curtail the flow of valuable information to lawmakers from the citizens and groups whose interests they are supposed to represent, *id.* at 137-38.

The Court in *Noerr* recognized that the interest in preserving the flow of information from citizens to lawmakers does not justify the conferral of immunity upon activities which abuse the processes of government. "There may be situations," said the Court, "in which a publicity campaign, ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified." 365 U.S. at 144.

The Court elaborated on the so-called "sham exception" to *Noerr* in *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972), which involved an alleged conspiracy by a group of truckers to indiscriminately resist applications filed by competing truckers with regulatory agencies to acquire or transfer operating rights. The Court held that the allegations in plaintiffs' complaint that defendants "sought to bar their competitors from meaningful access to adjudicatory tribunals and so to usurp that decisionmaking process" stated a valid cause of action, outside the protection of *Noerr*, under the Sherman Act. *Id.* at 512. It stated that abuse of the administrative and judicial processes may produce the illegal result of effectively barring access to the agencies and courts, *id.* at 513, and cited as examples of abuse the institution of proceedings "with or without probable cause, and regardless of the merits of the cases," *id.* at 513. It added that "[t]here are many other forms of illegal and reprehensible practice which may corrupt the administrative or judicial processes and which may result in antitrust violations." *Id.*

The Court reiterated in a later opinion, *Otter Tail Power Co. v. United States*, 410 U.S. 366, 380 (1973), that *Trucking Unlimited* holds "that the principle of *Noerr* may also apply to the use of administrative or judicial processes where the purpose to suppress competition is evidenced by repetitive lawsuits carrying the hallmark of insubstantial claims and thus is within the 'mere sham' exception announced in *Noerr*." In *Otter Tail* the Court, after remanding to the district court, affirmed that court's decision that a power company's institution of repetitive and baseless lawsuits to extend its retail power monopoly violated the Sherman Act. *See* 417 U.S. 901 (1974). Defendant's litigation campaign in *Otter Tail* was intended not to deny its competitors access to adjudicatory tribunals, but rather to directly impair their ability to raise capital by encumbering their financial statements with notices of pending litigation. This Court's decision recognizes that the interest in safeguarding citizenry access to the organs of government is not served by such abuses of the governmental process.

As Judge Browning, dissenting from the majority opinion below, put it, "[t]he complaint in this case alleges precisely what *Trucking Unlimited* holds to be an antitrust violation." 542 F.2d at 1087. In Judge Browning's words:

> ". . . McDonald's alleged that defendants combined 'to oppose, repeatedly, baselessly and in bad faith, the granting of building permits by the San Francisco Board of Permit Appeals (Board) for the construction of McDonald's restaurants.' McDonald's also alleged that defendants, by their repeated and baseless opposition to every McDonald's application, intended to and did fore-

close McDonald's from 'free and unlimited access'[1] to the Board and 'thereby interfere[d] directly with the business activities and relationships of a competitor.' Complaint, paragraph 18.

"These allegations, together with averments of anticompetitive purposes and effect, state an antitrust claim under *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 92 S.Ct. 609, 30 L.Ed.2d 642 (1972): 'A combination of entrepreneurs to harass and deter their competitors from having "'free and unlimited access'" to the agencies and courts, to defeat that right by massive, concerted, and purposeful activities of the group are ways of building one empire and destroying another. . . . If these facts are proved, a violation of the antitrust laws has been established.' *Id.* at 515, 92 S.Ct. at 614." 542 F.2d at 1086.

The majority at one point questions the Company's allegations that defendants' opposition to its permits was baseless, observing that "[w]e find it particularly hard to accept the characterization as 'baseless' or 'frivolous' of opposition which is entirely successful in obtaining the governmental action sought, as apparently was the case here." 542 F.2d at 1079. The Company's complaint explained that defendants' opposition to its permits was baseless because defendants knew that McDonald's, which has a reputation for serving high quality food at low prices in a congenial family atmosphere (App. E, para. 6), would satisfy all of the applicable city and county regulations (*id.* para. 18) and that the Board had no authority to act as an economic board of review (*id.*). On the majority's theory, defendants who abuse the adjudicatory process so adroitly that they prevail before the decisionmaking body are automatically insulated from Sherman Act liability; yet presumably defendants who are not successful have caused the victim no injury (aside perhaps from the comparatively insignificant costs of the litigation), creating a "heads we win, tails you lose" situation for the defendant. As Judge Browning observed,

> "[t]he complaint in *Trucking Unlimited* 'did not allege that the presentations made to the agencies and the courts were in themselves false, misleading, or lacking in evidentiary or legal support' . . . The antitrust defendants on both *Trucking Unlimited* and *Otter Tail* sought the favorable action of the tribunal when and if they could get it. The *Trucking Unlimited* complaint alleged that the antitrust defendants 'instituted the proceedings and actions . . . *with* or without probable cause, and *regardless of the merits* of the cases.'" 542 F.2d at 1088 n. 4. (Citations omitted.)

As Judge Browning goes on to point out, it is the abusiveness of the petitioning practices—the fact that they are undertaken *regardless* of whether there is probable cause—that is determinative. *Id.*

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[1]As Judge Browning observes: "It was unnecessary for appellants to allege that they were in fact foreclosed from access to the Board. It was neither alleged in the complaint in *Trucking Unlimited* nor proven in the trial in *Otter Tail* that the ability of competitors to present their views was actually foreclosed or that competitors were either prevented from filing applications with the tribunal or from obtaining a hearing. It is enough to allege a denial of *meaningful* access." 542 F.2d at 1088 n. 4. (Emphasis supplied.)

The complaints filed by the Company included not only the allegations of access-barring repeated and baseless opposition that were sustained in *Trucking Unlimited* and *Otter Tail,* but also allegations that defendants had abused the adjudicatory process in other ways that were condemned in *Trucking Unlimited* but that were not alleged in the complaint in that case. Thus, the proposed amended complaint[2] alleges that witnesses before the Board were secretly sponsored by defendants (App. F, para. 17(b)); *Trucking Unlimited* states expressly that misrepresentations are not immunized when used in the adjudicatory process. 404 U.S. at 513. The first amended complaint alleges that defendants may have acted in concert with the Board (other than its President) (App. E, para. 18); a similar allegation was sustained in *Harman v. Valley National Bank,* 339 F.2d 564 (9th Cir. 1964), a case which won the specific endorsement of *Trucking Unlimited,* 404 U.S. at 513. Finally, the proposed amended complaint (App. F. para. 17(e)) alleges that defendants engaged in several activities that were not directed at the Board at all, but rather were aimed at inflicting direct business injury on McDonald's; these activities, which include the dissemination of false and malicious

[2]The Company moved to file the proposed amended complaint within a few days after the District Court's dismissal of the first amended complaint; since the company was guilty of no undue delay, bad faith, or dilatory motive, and defendants would not have been prejudiced, leave to amend should have been forthcoming under Rule 15(a), Fed. R. Civ. P., unless the proposed amended complaint would also have been subject to dismissal for failure to state a claim. *See Foman v. Davis,* 371 U.S. 178, 182 (1962). The majority below upheld the District Court's denial of leave to file the proposed complaint on the ground that its allegations, like those in the original complaint, failed to state a claim under the majority's substantive standard. 542 F.2d at 1085.

statements through the news media, the harassment of customers at existing McDonald's restaurants, and the disruption of essential McDonald's restaurant supplies by means of illegal picketing, fall squarely within the "sham exception" announced in *Noerr, see* 365 U.S. at 144.

Thus, the complaints filed by the Company were, if anything, much more detailed than those sustained in *Trucking Unlimited* and *Otter Tail.* Nevertheless, the majority conjures out of those cases a rule that only activities external to the adjudicatory process which are aimed at completely foreclosing a competitor's access to that process are denied immunity, 542 F.2d at 1081, & n. 4, and that, more specifically, in the absence of any allegation that defendants had widely publicized or communicated to the Company threats of expensive and time-consuming litigation, the Company's complaints were fatally deficient, *id.* As Judge Browning notes in dissent, "[n]ot only does the majority cite no authority for this rule, but *Trucking Unlimited* and *Otter Tail* are exactly to the contrary." 542 F.2d at 1087. The defendants in those two cases, he adds,

> "did not lose antitrust immunity because they did anything in addition to participating in administrative and judicial processes. Immunity was lost because the defendants *abused* those processes by a pattern of conduct designed to eliminate competition by harassing and deterring competitors in their use of such processes and thus deny them *meaningful* access to such processes." 542 F.2d at 1088. (Emphasis supplied.)

Judge Browning observes that "[*n*]*othing in any of the opinions in the Otter Tail litigation suggests*

that the result reached depended upon the fact that threats were used. The opinions refer only to a pattern of unsubstantial litigation employed to maintain a monopoly." 542 F.2d at 1088 (emphasis supplied); *see id.* at n. 3. Similarly, *Trucking Unlimited* states specifically that "a pattern of baseless, repetitive claims" may produce the illegal result of "effectively barring respondents from access to the agencies and courts," 404 U.S. at 513, but the opinion contains no mention of any allegations that threats were communicated; the majority's assumption (542 F.2d at 1081) that the Court was referring to such allegations in a passing reference to "other allegations which are too lengthy to quote" (404 U.S. at 511) is pure conjecture.

Trucking Unlimited and *Otter Tail* stand for the proposition that the public interest recognized in *Noerr* in insuring ready access of the citizenry to the decision-making organs of government is not served by sheltering efforts to abuse the processes of government in order to achieve an anticompetitive purpose. Immunizing concerted activity of the sort alleged here, consisting of repeated and baseless opposition to each and every operating permit granted a competitor, accompanied by deception of Board members concerning the sponsors of witnesses before it and possible collusion of certain Board members with the defendants, all as part of a scheme to effectively deny the competitor access to the Board, would thwart rather than advance the *Noerr* interest in insuring everyone a fair opportunity to influence government officials. Such concerted activity carries with it all of the evils of any scheme to eliminate or exclude a competitor, evils which have been deemed serious enough by this Court to justify the *per se* condemnation of such schemes. *See United States v. General Motors Corp.*, 384 U.S. 127 (1966); *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959). Yet the majority below would confer a broad license on unscrupulous businessmen to abuse the processes of government in order to wipe out or exclude a competitor, provided only that they engage in no activity external to the governmental process designed to totally foreclose the competitor from access to the process.

Worse yet, the majority hints at one point that even external activities may be protected if they fail to actually prevent a competitor from invoking the adjudicatory process, for it comments upon the fact that McDonald's was not prevented from applying for permits or having a hearing before the Board. 542 F.2d at 1079. Since it is virtually impossible for a defendant to prevent a competitor from mailing a permit, or setting foot in a courtroom, nothing would be left of *Trucking Unlimited* under the majority's ruling.

Not content to stop there, the majority rules that not only are defendants privileged to abuse the processes of government to achieve an anticompetitive purpose, but their solicitation of governmental action creates an immunity for efforts to directly injure a competitor that are cloaked in the garb of appeals to decision-making bodies. The majority rules that such

efforts do not come under the ban of the *Noerr* sham exception for that exception "is limited to situations where the defendant is not seeking official action by a governmental body. . . ." 542 F.2d at 1081. It is apparently on this basis that the majority dismisses the Company's allegations of a malicious and false publicity campaign accompanied by harassment of customers and the disruption of McDonald's restaurant deliveries.[8] The majority's interpretation of *Noerr* ignores its express language that "[t]here may be situations in which a publicity campaign, *ostensibly directed toward influencing governmental action,* is a mere sham . . .," 365 U.S. at 144 (emphasis supplied), and overlooks the fact that when governmental action is not sought the *Noerr* immunity is not invoked in the first place and there is no need for an "exception" to it. Thus, the majority's interpretation would read the *Noerr* sham exception out of existence.

The majority's ruling is at odds not only with three decisions of this Court, but also with the decisions of Courts in other Circuits. In *Israel v. Baxter Laboratories,* 466 F.2d 272 (D.C. Cir. 1972), the D.C. Circuit sustained the complaint of a drug manufacturer who alleged that defendants had conspired to prevent Food and Drug Administration approval of plaintiff's drug "cothyrobal" by arranging for the FDA to employ

[8]The majority's rejection of these allegations may alternatively be based on its determination that they are accompanied by insufficient detail to satisfy the special pleading standard announced by the Court in the second part of its opinion, *see infra* pp. 22-31. 542 F.2d at 1085.

as a consultant a doctor having a financial interest in defendants, and by misrepresenting the safety and effectiveness of cothyrobal. The Court stated that "[n]o actions which impair the fair and impartial functioning of an administrative agency should be able to hide behind the cloak of an antitrust exemption." 466 F.2d at 278. *See Woods Exploration & Producing Co. v. Aluminum Co. of America,* 438 F.2d 1286 (5th Cir. 1971) (alleged conduct of Texas gas producers in filing false market demand forecasts with Texas Railroad Commission, and thereby inducing Commission to reduce production allowances for plaintiffs' wells, not immune from antitrust laws); *Metro Cable Co. v. CATV,* 516 F.2d 220, 228 (7th Cir. 1975) ("When, however, the concerted activities occur in an adjudicatory setting, unethical conduct that would not result in antitrust illegality in a legislative or other nonadjudicatory setting may demonstrate that the defendants' activities are not genuine attempts to use the adjudicative process legitimately and may, therefore, result in illegality, including illegality under the antitrust laws") (dictum); *Semke v. Enid Automobile Dealers Assn.,* 456 F.2d 1361, 1366 (10th Cir. 1972) ("[T]he term 'sham' in this context would appear to mean misuse or corruption of the legal process") (dictum). Thus, this Court, by granting certiorari on this important issue of Sherman Act construction, could put an end to the inconsistencies not only between its prior decisions and the decision of the majority below, but also among the decisions of the various Circuits.

II

The Special Pleading Rule Announced by the Majority for Actions Involving Conduct "Prima Facie Protected by the First Amendment" Is Directly at Odds With Rules 8 and 12 of the Federal Rules of Civil Procedure and an Established Body of Precedent Interpreting Those Rules, and Seriously Undermines the Efficacy of the Private Action as a Weapon Against a Broad Range of Antitrust Offenses and Against Offenses Under Other Regulatory Laws That May Colorably Be Alleged to Inhibit First Amendment Rights.

Even assuming that the substantive rule of law announced by the majority is valid, and that the access-barring conduct condemned in *Trucking Unlimited* must encompass activities external to the adjudicatory process, the Company's general allegations that defendants had acted in concert "to deter plaintiffs from pursuing building permits for restaurants and to effectively foreclose plaintiffs from free and unlimited access" to the Board (App. F, para. 17(a)),[4] accompanied by the allegations that defendants had disseminated false and malicious statements through the news media designed to arouse public wrath against McDonald's, and had disrupted supplies and harassed customers at existing McDonald's restaurants (*id.* para. 17(e)), adequately stated a cause of action under the majority's substantive

[4]These allegations were included in the Proposed Amended Complaint; the majority did not distinguish between the allegations in the original and in the proposed amended complaints for purposes of its holding, which was premised on its conclusion that neither set of allegations stated a cause of action. See n. 2, *supra*.

standard. The majority recognized this, for it stated (542 F.2d at 1082) that

> "[o]rdinarily the conclusory nature of plaintiffs' allegations might warrant greater indulgence, for dismissal of a complaint is normally proper under Rule 12(b)(6) only if 'it appears beyond doubt that the plaintiff[s] can prove no set of facts in support of [their] claim which would entitle [them] to relief.' *Conley v. Gibson*, 1957, 355 U.S. 41, 45-46 . . ."

The majority ruled, however, that a special pleading rule must be applied to safeguard the First Amendment right to petition a governmental body:

> "What we . . . hold is that in any case, whether antitrust or something else, where a plaintiff seeks damages or injunctive relief, or both, for conduct which is prima facie protected by the First Amendment, the danger that the mere pendency of the action will chill the exercise of First Amendment rights requires more specific allegations than would otherwise be required." 542 F.2d at 1082-83.

The majority does not elaborate on the degree of specificity required by its unprecedented ruling. It is difficult to see how the Company could have added much to its allegations of "consistent, repeated and baseless opposition" to "each and every permit" in the face of the Company's compliance with all applicable regulations; the majority evidently dismisses these allegations on the ground that the conduct involved is not external. More puzzling is the majority's curt rejection (542 F.2d at 1084-85) of the Company's detailed allegations that defendants had engaged in the "dissemination of malicious and false statements

through the news media designed to arouse public wrath against McDonald's," the "harassment of plaintiffs' customers at existing McDonald's restaurants," and "illegal picketing and disruption of the delivery of essential supplies to existing McDonald's restaurants." (App. F, para. 17(e).) Apparently the majority is insisting on the sort of elaborate inventory of names, dates, and places ordinarily reserved for the answers to interrogatories in discovery.

As Judge Browning notes in dissent, 542 F.2d at 1090, the majority cites no authority to support its new rule. That rule flatly contradicts the terms of Rules 8(a), 8(f), and 12(b)(6) of the Federal Rules of Civil Procedure, several decisions of this Court, and innumerable decisions of courts in other circuits. The standard for passing on a motion under Rule 12(b)(6) to dismiss a complaint for failure to state a claim upon which relief can be granted is set forth in Rule 8(a)(2), which states that a pleading shall contain "a short and plain statement of the claim showing that the pleader is entitled to relief." These Rules "restrict the pleadings to the task of general notice-giving and invest the deposition-discovery process with a vital role in the preparation for trial. The various instruments of discovery now serve (1) as a device, along with the pre-trial hearing under Rule 16, to narrow and clarify the basic issues between the parties, and (2) as a device for ascertaining the facts. . . ." *Hickman v. Taylor,* 329 U.S. 495, 501 (1947). Under Rule 8(f), which states that "[a]ll pleadings shall be so construed as to do substantial justice," pleadings are to be given a liberal reading. *Jenkins v. McKeithen,* 395 U.S. 411, 421 (1969); *see Beacon Theatres, Inc. v. Westover,* 359 U.S. 500, 506 (1959).

In short, the Rules "do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is 'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Conley v. Gibson,* 355 U.S. 41, 47 (1957). The majority below tacitly conceded (542 F.2d at 1082) that the Company's complaint satisfied these requirements and that its action in dismissing the complaint was a departure from the injunction in *Conley,* 355 U.S. at 45-46, that a complaint should not be dismissed unless no set of facts could be proved which would entitle the plaintiff to relief. *See Scheuer v. Rhodes,* 416 U.S. 232, 236 (1974).

Apart from certain types of actions specifically excepted by Rule 9, there are "no special pleading provisions in the federal rules. The same pleading philosophy controls in every case, regardless of its size, complexity, or the number of parties that may be involved." 5 C. Wright & A. Miller, *Federal Practice & Procedure* § 1221 at 149 (1969). The liberal pleading philosophy of the Federal Rules has been held to be as applicable to antitrust cases as to any others. *New Home Appliance Center, Inc. v. Thompson,* 250 F.2d 881 (10th Cir. 1957); *Nagler v. Admiral Corp.,* 248 F.2d 319 (2d Cir. 1957); *see* 5 Wright & Miller, *supra,* at § 1228.

More importantly, in two antitrust cases involving precisely the sort of allegations involved here—concerted activity to exclude a competitor by abusing governmental processes—this Court has affirmed the applicability of the liberal pleading standards of the Rules in ruling that lower court dismissal of the com-

plaint was erroneous. In *Trucking Unlimited*, the Court stated that "[w]hat the proof will show is not known, for the District Court granted the motion to dismiss the complaint. We must, of course, take the allegations of the complaint at face value for the purposes of that motion." 404 U.S. at 515. And in *Hospital Bldg. Co. v. Trustees of the Rex Hospital*, 96 S.Ct. 1848 (1976), a case involving alleged concerted activity to delay or prevent the issuance of state authorization for the relocation and expansion of a hospital that would have competed with defendants, this Court relied (96 S.Ct. at 1853) on the precise language in *Conley v. Gibson, supra,* that the majority below declared would "ordinarily" bar dismissal of a generally-worded complaint but was inapplicable here. 542 F.2d at 1082. *See Israel v. Baxter Laboratories, Inc.*, 466 F.2d 272, 279 (D.C. Cir. 1972).

Thus, the majority's holding on the pleading issue promulgates a substantial modification of the Federal Rules of Civil Procedure. The majority's ruling not only disregards a large body of settled precedent, it runs afoul of federal statute. As Judge Browning stated,

> "[T]he power to prescribe general rules of civil procedure for the district courts is vested in the Supreme Court; rules promulgated pursuant to this authority must be reported to Congress before becoming effective. 28 U.S.C. § 2072.
>
> "It is of course necessary that courts interpret and apply the rules in particular cases, but this court has no authority to announce what is in effect a substantial modification of the rules." 542 F.2d at 1090.

The implications of the majority's ruling are exceedingly far-reaching. As Justice Marshall, speaking for

a unanimous Court, stated in *Rex Hospital, supra,* 98 S.Ct. at 1853, ". . . in antitrust cases, where 'the proof is largely in the hands of the alleged conspirators [citations omitted],' dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly." At a minimum, the majority's rule would virtually insure Sherman Act immunity to those who would injure their competitors by abusing the processes of government, either by using unfair means to procure discriminatory licensing, zoning, tax or other legislative or adjudicatory action, or by imposing upon their competitors the burden of combatting a program of baseless and indiscriminate litigation as in *Otter Tail.* The immunity would derive from the fact that the victim would almost never be able to supply enough factual detail about the defendants' misconduct at the pleading stage to satisfy the majority's standard. Thus, *Trucking Unlimited* and *Otter Tail* would be effectively emasculated.[5]

The majority's formidable pleading requirements are not restricted in their application to plaintiffs alleging conduct of the sort condemned in *Trucking Unlimited,* however; rather, they are imposed whenever a plaintiff seeks relief "for conduct which is prima facie protected by the First Amendment." 542 F.2d at 1083. Given the recently expanded protection afforded commercial speech under the First Amendment, *see Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council,* .... U.S. ...., 96 S.Ct. 1817 (1976); *Bigelow*

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[5]This would be true even if the majority's substantive standard were rejected; although a plaintiff alleging that he had been the victim of concerted abuse of the governmental process would not have to allege that the abuse was accompanied by conduct external to the process, the nature of the abuse would have to be pleaded in more detail than most plaintiffs could supply at the pleading stage.

v. Virginia, 421 U.S. 808 (1975), and the fact that the conduct proscribed by the antitrust laws often consists largely if not entirely of communication, the scope of the majority's rule may be vast indeed. As Judge Browning observed,

> "*The number of cases within the exception is undoubtedly large, including most antitrust litigation.* '[T]he Sherman Act punishes the conspiracies at which it is aimed on the common law footing—that is to say, it does not make the doing of any act other than the act of conspiring a condition of liability.' [Citation omitted] Thus the crux of an offense under section 1 of the Sherman Act is an agreement or meeting of minds, usually arising out of associations and communication among businessmen." 542 F.2d at 1089. (Emphasis supplied.)

Some hint of the potentially enormous coverage of the majority's pleading rule is contained in the majority's rejection of the Company's allegations of customer harassment and illegal picketing, accompanied by the disruption of deliveries; the majority stated that "[w]e are not told the nature or extent of the picketing, and no specific facts are alleged to indicate that, by virtue of its purpose or manner, the picketing falls outside the traditional protection afforded this activity by the First Amendment." 542 F.2d at 1085. Obviously, the majority's decision would permit defendants charged with conduct bearing only a remote resemblance to the exercise of a First Amendment right to force a preliminary determination by the district

court of whether the conduct alleged is "prima facie" protected by the First Amendment, and thus must be pleaded in special detail. Confronting the private antitrust plaintiff, who already encounters usually lengthy and expensive litigation, with the additional prospect of having to litigate whether conduct is prima facie protected by the First Amendment, and with the likelihood that if the conduct is found to be so protected he will be unable to file a sufficiently detailed complaint, would deal a severe blow to the efficacy of the private action in the enforcement of the antitrust laws. Such a result would flout this Court's repeated pronouncements that the purposes of the antitrust laws are best served by fostering the private action as an ever-present threat to potential violators. *See Perma Life Mufflers, Inc. v. International Parts Corp.,* 392 U.S. 134, 139 (1968); *Zenith Radio Corp. v. Hazeltine Research, Inc.,* 395 U.S. 100, 130-31 (1969).

The majority's ruling threatens to undermine not only the enforcement of the antitrust laws, but also the enforcement of other regulatory laws that may colorably be alleged to inhibit the expression of commercial speech or the exercise of other First Amendment rights. Since there is no bright-line test for determining whether conduct is "prima facie protected by the First Amendment," and since the coverage of the First Amendment is undergoing continual evolution, no certain bounds can be placed on the scope of the majority's rule. Certainly the potential range of instances in which defendants may attempt to invoke

the rule's protection, and thus force a preliminary determination of the rule's applicability by the trial court, is breathtaking.

The stupendous costs the majority's pleading rule would exact might be justified if there were no other way to dispose of unwarranted damage actions before trial. But that is not the case. As the Ninth Circuit itself declared in *Harman v. Valley National Bank*, 339 F.2d 564 (1964), a case which won the endorsement of *Trucking Unlimited*, 404 U.S. at 513,

> ". . . a motion to dismiss is not 'the only effective procedural implement for the expeditious handling of legal controversies. Pretrial conference; the discovery procedures; and motions for a more definite statement, judgment on the pleadings and summary judgment, all provide useful tools for the sifting of allegations and the determinations of the legal sufficiency of an asserted claim' short of trial. [Citations omitted]" 339 F.2d at 567. *See* 5 Wright & Miller, *supra*, § 1228 at 170.

Granted, absent the majority's rule an action would often have to proceed into the discovery stage before it could be dismissed for factual insufficiency. But the draftsmen of the Federal Rules made the determination that the burdens this might impose on a defendant are justified in the interest of advancing the overriding goal of deciding cases on their merits, since whether a case has merit often cannot be known until discovery. The majority's ruling is directly at odds with the Federal Rules and the decisions of this Court interpreting

those Rules. The ruling would revolutionize pleading standards, with far-reaching impact on many areas of substantive law, in the service of a policy that is adequately protected by existing pleading standards. Thus, there is an urgent need for review of the ruling, so that it may be defused before some of its more ruinous consequences are felt.

Conclusion.

For the reasons set forth, it is respectfully submitted that a writ of certiorari should issue to review the questions presented herein.

Respectfully submitted,

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APPENDIX A.

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit.

Franchise Realty Interstate Corporation and McDonald's Systems of California, Inc., *Plaintiffs-Appellants,* vs. San Francisco Local Joint Executive Board of Culinary Workers, et al., *Defendants-Appellees.* No. 73-2727.

[September 17, 1976]

On Appeal from the United States District Court for the Northern District of California

Before: BROWNING and DUNIWAY, Circuit Judges, and MARKEY,* Chief Judge, United States Court of Customs and Patent Appeals.

DUNIWAY, Circuit Judge:

Plaintiffs (McDonald's), two subsidiaries of McDonald's Corporation, appeal from a judgment dismissing their first amended complaint without leave to amend, and the action (Rule 12(b)(6), F.R. Civ. P.), and from an order denying their motion, made after the judgment, for leave to file a second amended complaint (Rules 15(a) and 60(b)(6), F.R. Civ. P.). We affirm.

In the first amended complaint, McDonald's alleged that the defendants, two associations of restaurant and hotel employers and a labor union, had combined and conspired, in violation of § 1 of the Sherman Act, 15 U.S.C. § 1, to oppose, repeatedly, baselessly and

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*Sitting by designation.

in bad faith, the granting of building permits by the San Francisco Board of Permit Appeals (Board) for the construction of McDonald's restaurants.

McDonald's first amended complaint alleges that in 1971 McDonald's, which operates two restaurants in San Francisco, applied for licenses for the operation of three more restaurants, that permits were granted by the San Francisco Department of Public Works, and that the defendants "persuaded" the San Francisco Board of Permit Appeals to overrule the issuance of the permits and to deny them.

It then continues:

> 17. The aforesaid combination and conspiracy has consisted of a continuing agreement and concert of action, the substantial terms of which have been and are:
>
> (a) That each defendant would appear before the Board of Permit Appeals of the City and County of San Francisco and would oppose each and every permit granted to the Company by the San Francisco Department of Public Works;
>
> (b) That each defendant would solicit the appearance before the Board of such of its members and others as it could secure to support its opposition to issuance of each such permit;
>
> (c) That each defendant would threaten lack of political support to each Board member and other city officials who supported the Company.
>
> 18. The conduct described in paragraphs 16 and 17 herein was unlawful in that neither defendant was acting in good faith; instead the consistent, repeated and baseless opposition to the permits accorded the Company by the Department of Pub-

> lic Works was the product of a combination and conspiracy entered into with the explicit purpose of insulating restaurant operators in San Francisco from the competition of McDonald's restaurants and each such opposition was sham and frivolous in that by such opposition the defendants intended to and did no more than cover up a plan to foreclose the Company from free and unlimited access to the Department of Public Works and the Board of Permit Appeals of the City and County of San Francisco, and thereby interfere directly with the business activities and relationships of a competitor. Such opposition specifically undertook to injure and suppress the activities of a competitor who offered quality food at low prices in a family atmosphere.
>
> 19. Moreover, each defendant knew its activities to be unlawful and knew them to be a sham and frivolous in that each was well aware of the fact that the Company had intended to and did comply with all of the necessary code requirements, ordinances and regulations applicable to the conduct of its proposed restaurants and that the Board of Permit Appeals of the City and County of San Francisco had absolutely no authority, right, duty or responsibility to act as an economic board of review with the power to determine who and on what terms competition shall exist within the confines of San Francisco. Each defendant thus knew that by its plan of systematic, indiscriminate and wanton attack on the Company it was inducing, if not acting in concert with, the Board of Permit Appeals (other than its President), to subvert the constitutional function of

> that Board and to do no more than frustrate McDonald's restaurants as a competitive factor in the City and County of San Francisco.

Nowhere in the complaint does McDonald's tell us, specifically, how or why or even whether the defendants' alleged efforts to influence the Board have in any way impaired McDonald's ability fully to present its views to the Board. Nowhere is it alleged that McDonald's was prevented from applying for permits, or from having a hearing before the Board.

The mere reversal of the grant of the three applications, at the urging of the defendants, suggests no more than "that the plaintiffs and defendants met head-on before the Board and that plaintiffs lost," as the district court noted in its opinion. The complaint fails to adduce any specific facts to support the conclusory allegation that defendants' opposition before the Board was "sham" or "frivolous." This deficiency is hardly surprising, for we seriously doubt that any argument raised before the Board could be so characterized in view of the extremely broad standards governing the exercise of that body's discretion. Under section 3.651 of the Charter of the City and County of San Francisco, the Board would appear to have the authority to deny a permit whenever in its judgment issuance would adversely affect the "interests or property" of any person, or merely "the general public interest."[1]

[1]Section 3.651 provides, in pertinent part:

> *3.651 Functions, Powers and Duties*
>
> . . . [A]ny person who deems that his interests or property or that the general public interest will be adversely affected as a result of operations authorized by or under any permit or license granted or issued by any department may appeal to the board of permit appeals. Such board shall hear the applicant, the permit-holder, or other interested parties, as well as the head or representative of the department issuing or refusing to issue such license or permit, or ordering the revocation of the same. After such hearing and such further investigation as the board may deem necessary, it may concur in the action of the department authorized to issue such license or permit, or, by the vote of four members, may overrule the action of such department and order that the permit or license be granted, restored or refused.

The absence of more definite standards suggests that the Board is as much a political as an adjudicatory body. The relatively precise legal standards in light of which certain arguments may be characterized as "frivolous" are simply absent from the rough and tumble of the political arena; almost any position, including the self-interested plea of one competitor that another should be denied a permit, may be urged before such a political body. We find it particularly hard to accept the characterization as "baseless" or "frivolous" of opposition which is entirely successful in obtaining the governmental action sought, as apparently was the case here.[2]

Be that as it may, the question before us is not whether defendants' arguments were frivolous, but, assuming that they were, whether the defendants opposition, as alleged in the complaint, is a violation of the Sherman Act. We think not.

In *Eastern Railroad Presidents Conference v. Noerr Motor Freight,* 1961, 365 U.S. 127, a group of railroads had hired a public relations firm to conduct a two-pronged campaign against competing truckers.

[2]McDonald's might have a remedy in the California courts if the Board improperly reversed the granting of its permits. Nothing in the complaint indicates that it has attempted to obtain such a remedy. We know of no case that holds that joint action which succeeds in persuading a public body to make an erroneous decision can give rise to a cause of action under the Sherman Act.

One component was a lobbying effort to influence state legislators and executive officers to enact and zealously enforce legislation restricting the trucking industry. The other was a publicity campaign which, according to the truckers, was intended to destroy their general public reputation and the goodwill they had built up with their customers in order to enhance the railroads' share of the long distance freight market.

With respect to the direct lobbying effort, the Supreme Court declared categorically that

> the Sherman Act does not prohibit two or more persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint (of trade) or a monopoly. *Id.* at 136.

The Court felt that a contrary construction of the Sherman Act would threaten the First Amendment right of petition, and curtail the flow of valuable information to the government from citizens and groups seeking to influence governmental action. *See* 365 U.S. at 137-38.

For similar reasons, the Court found that the lobbying immunity also encompassed the railroads' publicity campaign, even though the trial court had found that its sole purpose had been to inflict competitive injury and that the tactics employed had been deceptive and unethical:

> The right of the people to inform their representatives in government of their desires with respect to the passage or enforcement of laws cannot properly be made to depend upon their intent in doing so. It is neither unusual nor illegal for

> people to seek action on laws in the hope that they may bring an advantage to themselves and a disadvantage to their competitors. . . . Indeed, it is quite probably people with just such a hope of personal advantage who provide much of the information upon which governments must act. We . . . hold that, at least insofar as the railroads' campaign was directed towards obtaining governmental action, its legality was not at all affected by any anticompetitive purpose it may have had.
>
> * * * *
>
> It is inevitable, whenever an attempt is made to influence legislation by a campaign of publicity, that an incidental effect of that campaign may be the infliction of some direct injury upon the interests of the party against whom the campaign is directed. And it seems equally inevitable that those conducting the campaign would be aware of, and possibly even pleased by, the prospect of such injury. To hold that the knowing infliction of such injury renders the campaign itself illegal would thus be tantamount to outlawing all such campaigns. *Id.* at 139-40, 143-44.

In *United Mine Workers v. Pennington*, 1965, 381 U.S. 657, the Court reaffirmed the *Noerr* lobbying immunity and particularly emphasized the irrelevance of the petitioners' underlying motivation:

> *Noerr* shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose. The Court of Appeals, however, would hold the conduct illegal depending upon proof of an illegal purpose. . . . (This holding

is not) permitted by *Noerr* for the reasons stated in that case. Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition. Such conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act. *Id.* at 670.

The activities of defendants specifically alleged in the complaint before us consist entirely of attempts to lobby and petition a governmental body. Under *Noerr* and *Pennington, supra,* these activities are absolutely immune from antitrust liability.[3]

McDonald's reliance on the *Noerr* "sham exception" is misplaced. That exception does not extend to direct lobbying efforts such as those alleged here, but only to publicity campaigns, which this complaint does not allege. The following is the whole of the *Noerr* opinion's comment on the sham exception:

> There may be situations in which *a publicity campaign,* ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually *nothing more than* an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified. But this certainly is not the case here. No one denies that the railroads were making a genuine effort to influence legislation and law enforcement practices. Indeed, if the version of the facts set forth in the truckers'

[3]While *Noerr* and *Pennington* involved attempts to influence legislative and executive action, it is now clear that the same principles govern efforts by citizens or groups to influence administrative and judicial proceedings. *California Motor Transport Co. v. Trucking Unlimited,* 1972, 404 U.S. 508, 510.

> complaint is fully credited, as it was by the courts below, that effort was not only genuine but also highly successful. Under these circumstances, we conclude that no attempt to interfere with business relationships in a manner proscribed by the Sherman Act is involved in this case. 365 U.S. at 144 (emphasis added).

Even if the sham exception did apply to direct lobbying efforts, its scope is limited to situations where the defendant is not seeking official action by a governmental body, so that the activities complained of are "nothing more" than an attempt to interfere with the business relationships of a competitor. *See* Handler, *Twenty-Five Years of Antitrust,* 73 Colum. L. Rev. 415, 436. Here it is clear that defendants were seeking and obtained official action from a governmental body, denial of McDonald's permit applications by the Board.

Equally erroneous is the contention that the specific conduct alleged falls within a further exception to *Noerr* created by *California Motor Transport Co. v. Trucking Unlimited,* 1972, 404 U.S. 508. In that case the Court held that a claim for relief was stated by a complaint which alleged that a group of large trucking companies had established a joint trust fund to finance indiscriminate opposition to every application for certificates of public convenience and necessity that smaller competitors filed with state and federal regulatory agencies. But the allegations which both this court and Justice Douglas' majority opinion found "more critical" (404 U.S. at 508) in that complaint—that a well financed campaign to oppose competitors' applications was widely publicized and that express threats of expensive and time-consuming opposition were

communicated to the competitors—have no identifiable analogue in the complaint before us here. In its opinion, the Court said that these allegations "are too lengthy to quote" (*id.*). They are summarized in this court's opinion. *See Trucking Unlimited v. California Motor Transport Co.*, 9 Cir., 1970, 432 F.2d 755, 757, 762. The contrast between those allegations and the allegations in this case is marked. While McDonald's alleges, as did the plaintiffs in *Trucking Unlimited*, that the purpose and effect of the defendants' opposition is "to foreclose the Company from free and unlimited access" to administrative agencies, its complaint is unlike that in *Trucking Unlimited* in that it fails to allege any means by which defendants have achieved, or plan to achieve, their alleged goal of barring McDonald's from access to the Board. There is no allegation that defendants have conducted a publicity campaign, no allegation that their efforts are jointly financed, and, most importantly, no allegation that defendants have by communicating threats sought to deter McDonald's from filing permit applications. The only facts relied on to support the otherwise wholly conclusory access-barring allegation are the appearances of defendants' members and others before the Board and the threats to withdraw political support, on three occasions. Both of these activities are clearly within the direct lobbying immunity recognized by *Noerr*, *Pennington* and *Trucking Unlimited* itself.[4]

[4]"We conclude that it would be destructive of rights of association and of petition to hold that groups with common interests may not, without violating the antitrust laws, use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view respecting resolution of their business and economic interests *vis-a-vis* their competitors." *Trucking Unlimited, supra,* 404 U.S. at 510-

Ordinarily the conclusory nature of plaintiffs' allegations might warrant greater indulgence, for dismissal of a complaint is normally proper under Rule 12(b)(6) only if "it appears beyond doubt that the plaintiff(s) can prove no set of facts in support of (their) claim which would entitle (them) to relief." *Conley v. Gibson,* 1957, 355 U.S. 41, 45-46; *Corsican Productions v. Pitchess,* 9 Cir., 1964, 338 F.2d 441, 442. But this is not an ordinary case. The Supreme Court has recognized that the right to associate and to petition an administrative agency to take official action in the exercise of its powers is guaranteed by the First Amendment. *Trucking Unlimited, supra,* 404 U.S. at 510-11. Yet McDonald's would have us hold, in effect, that a claim for relief under the Sherman Act is stated by a mere conclusory allegation that this right is being exercised for the purpose of barring a competitor from access to the agency. We decline this invitation because to condition the right to associate and petition on the motivations of the petitioners would have a chilling

11. The qualification of this statement later in Justice Douglas' opinion, *viz.*, that the right to petition, though protected by the First Amendment, does not necessarily confer antitrust immunity on the petitioner (*id.* at 513), must be read in light of *Noerr* and *Pennington* and in light of the facts of *Trucking Unlimited* itself. So considered, we think it plain that this qualification means no more than that defendants who engage in *Noerr*-protected lobbying activities may nevertheless subject themselves to antitrust liability if they engage in activities external to or abusive of the legislative, administrative or judicial process, which activities, like the threats of opposition in *Trucking Unlimited,* tend "to harass and deter . . . competitors from having 'free and unlimited access' to (appropriate) agencies." *See id.* at 515; Handler, *surpa,* 73 Colum. L. Rev. at 436-39; Note *Limiting the Antitrust Immunity for Concerted Attempts to Influence Courts and Administrative Agencies: Analogies to Malicious Prosecution and Abuse of Process,* 86 Harv. L. Rev. 715, 732-35. No allegations that defendants have engaged in any external activities of this type appear in McDonald's complaint.

effect on exercise of this fundamental First Amendment right, and such a ruling would in a practical sense render the *Trucking Unlimited* exception coextensive with the *Noerr* immunity.

Regardless of what the actual facts might be, what plaintiff interested in deterring his competitors' opposition before a governmental body would fail to recite in its complaint the conclusory "access-barring" incantation? And what competititor, knowing that its participation in administrative proceedings might result in expensive and burdensome litigation, which would drag on through the discovery stage at least, would not thereby feel pressured to forego presenting its views to the government? Particularly in antitrust litigation, the long drawn out process of discovery can be both harassing and expensive. When this well known fact is combined with the large damages usually claimed (here at $11,-100,000.00) and sometimes awarded, an action like this one can be, from the very beginning, a most potent weapon to deter the exercise of First Amendment rights.

The Supreme Court has consistently recognized the sensitivity of First Amendment guarantees to the threat of harassing litigation, and has erected barriers to safeguard those guarantees. *See, e.g., Time, Inc. v. Hill,* 1967, 385 U.S. 374, 387-91; *New York Times Co. v. Sullivan,* 1964, 376 U.S. 254, 267-83; *N.A.A.C.P. v. Button,* 1963, 371 U.S. 415, 431-33. Because we think that similar values are endangered in this case, we hold that in order to state a claim for relief under the *Trucking Unlimited* exception, a complaint must include allegations of the specific activities, not protected by *Noerr,* which plaintiffs contend have barred their access to a governmental body. The deficiencies

of McDonald's amended complaint in this regard are evident from what we have said above. Dismissal of that complaint was proper.

In holding that plaintiffs' allegations are insufficient in this case, we are not adopting a rule that so-called "fact" pleading, as distinguished from "notice" pleading, is required in antitrust cases. We repudiated that notion in *Walker Distributing Co. v. Lucky Lager Brewing Co.,* 9 Cir., 1963, 323 F.2d 1, 3-4. What we do hold is that in any case, whether antitrust or something else, where a plaintiff seeks damages or injunctive relief, or both, for conduct which is prima facie protected by the First Amendment, the danger that the mere pendency of the action will chill the exercise of First Amendment rights requires more specific allegations than would otherwise be required.

It is no answer to say that there are better ways in which the defendants can show the lack of merit of the action. Reference is usually made to a motion for summary judgment. But this is not an answer in most cases. We are told that the motion is usually inappropriate in complex cases. *Poller v. Columbia Broadcasting Co.,* 1962, 368 U.S. 464, 473. Moreover, it takes little to establish a conflict of evidence as to a material fact. And if the defendants, by affidavits fully conforming to the rule, show that the case is without merit, and if fear of perjury (a rather uncommon fear among the makers of affidavits) prevents the filing of directly contradictory affidavits, Rule 56 still gives the plaintiffs an escape hatch. They can claim that they won't know the facts until they have had discovery and get action on the motion postponed. Moreover, the sanctions of Rule 56(g) are invoked

with "extreme infrequency." *See Alart Associates, Inc. v. Aptaker,* 2 Cir., 1968, 402 F.2d 779, 780.

The Supreme Court seems now to be aware of a fact long known to practitioners. The liberal discovery rules of the Federal Rules of Civil Procedure offer opportunities for harassment, abuse, and vexatious imposition of expense that can make the mere pendency of a complex lawsuit so burdensome to defendants as to force them to buy their peace regardless of the merits of the case. The decision in *Blue Chip Stamps v. Manor Drug Stores,* 1975, 421 U.S. 723, an action based on § 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 of the SEC, recognizes this fact and is to be a considerable extent based upon it:

> There has been widespread recognition that litigation under Rule 10b-5 presents a danger of vexatiousness different in degree and in kind from that which accompanies litigation in general. This fact was recognized by Judge Browning in his opinion for the majority of the Court of Appeals in this case, 492 F.2d, at 141, and by Judge Hufstedler in her dissenting opinion when she said:
>
> The purchaser-seller rule has maintained the balance built into the congressional scheme by permitting damage actions to be brought only by those persons whose active participation in the marketing transaction promises enforcement of the statute without undue risk of abuse of the litigation process and without distorting the securities market. *Id.* at 147
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> * * * *

We believe that the concern expressed for the danger of vexatious litigation which could result from a widely expanded class of plaintiffs under Rule 10b-5 is founded in something more substantial than the common complaint of the many defendants who would prefer avoiding lawsuits entirely to either settling them or trying them. These concerns have two largely separate grounds.

The first of these concerns is that in the field of federal securities laws governing disclosure of information even a complaint which by objective standards may have very little chance of success at trial has a settlement value to the plaintiff out of any proportion to its prospect of success at trial so long as he may prevent the suit from being resolved against him by dismissal or summary judgment. The very pendency of the lawsuit may frustrate or delay normal business activity of the defendant which is totally unrelated to the lawsuit.

* * * *

The potential for possible abuse of the liberal discovery provisions of the Federal Rules of Civil Procedure may likewise exist in this type of case to a greater extent than they do in other litigation. The prospect of extensive deposition of the defendant's officers and associates and the concomitant opportunity for extensive discovery of business documents is a common occurrence in this and similar types of litigation. To the extent that this process eventually produces relevant evidence which is useful in determining the merits of the claims asserted by the parties, it bears the imprimatur of those Rules and of the

> many cases liberally interpreting them. But to the extent that it permits a plaintiff with a largely groundless claim to simply take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value, rather than a reasonably founded hope that the process will reveal relevant evidence, it is a social cost rather than a benefit.

There are many cases in which, if the right to petition protected under the First Amendment is to have value, it must be exercised without delay. This is such a case. If the defendants did not appear at the Board's scheduled hearing, their right to petition would be lost. If this action were still pending below, that fact might have caused them not to appear at another hearing. The dangers that the Court saw in *Blue Chip* are also visible here.

Otter Tail Power Co. v. United States, 1973, 410 U.S. 366, cited by plaintiffs, is not germane to the issue before us. In that case the district court had held that the *Noerr* immunity was inapplicable to the instigation of judicial proceedings. *United States v. Otter Tail Power Co.*, D. Minn., 1971, 331 F. Supp. 54, 62. One paragraph of the Supreme Court's opinion, 410 U.S. 379-80, remanded the immunity issue for reconsideration in light of the intervening *Trucking Unlimited* decision, which recognized that *Noerr* did apply to judicial proceedings. *See* 404 U.S. at 510. That paragraph obviously cannot be read, as McDonald's would have us read it, as a holding that the *Otter Tail* facts fall within the *Trucking Unlimited* exception. But even if the Supreme Court had so held, as the district court did on remand (D. Minn., 1973, 360

F. Supp. 451), the facts in *Otter Tail* are no more similar to those in our case than are the facts in *Trucking Unlimited.* As in *Trucking Unlimited,* the complaint in *Otter Tail* alleged that the defendant had threatened potential competitors—municipalities seeking to take over electric power facilities then operated by the defendant—with instigation of baseless proceedings—litigation which had the effect of delaying and increasing the expense of sale of municipal securities necessary to finance the takeover. The defendant allegedly hoped that the added expense and delay would force the municipalities to abandon their takeover plans and renew their power contracts with the defendant. Thus, the gravamen of the government's case in *Otter Tail* was not defendant's instigation of the litigation, a right guaranteed by the First Amendment, *see Trucking Unlimited, supra,* 404 U.S. at 510, but the fact that the defendant had used the threat of litigation as a bludgeon in its attempts to retain its monopoly in the regional electric power market.

In one respect *Otter Tail* is a "through the looking glass" version of the case at bar. In that case, whenever a community sought to go into the power business, Otter Tail sued. The effect of the mere filing of the action destroyed the community's ability to proceed. Nobody would buy its bonds while the action was pending. Mere filing was enough to accomplish Otter Tail's purpose. In our case, that is not so. Mere opposition would not defeat McDonald's purpose; to do that, defendants had to persuade the Board to rule in their favor—and it is alleged that they succeeded. The only bit of *in terrorem* litigation here is McDonald's action, an avowed purpose of which is to eliminate opposition,

even the defendants' successful opposition, to its desires before the Board.

The proposed second amended complaint, submitted to the district court in conjunction with McDonald's motion to set aside the judgment and for leave to file the complaint, adds little but adjectives to the first amended complaint.[5] The new complaint alleges

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[5]Paragraphs 18 and 19 of the second amended complaint are virtually identical to paragraphs 18 and 19 of the first amended complaint. Paragraph 17 of the new complaint is as follows:

"The aforesaid combination and conspiracy has consisted of a continuing agreement and concert of action, the substantial terms of which have been and are:

"(a) Motivated by an intent to deter plaintiffs from pursuing building permits for restaurants and to effectively foreclose plaintiffs from free and unlimited access to the Department of Public Works and the Board of Permit Appeals, the defendants would appear before the Board of Permit Appeals of the City and County of San Francisco and would oppose each and every permit granted to the Company by the San Francisco Department of Public Works;

(b) The defendants would secretly solicit the appearance before the Board of such of its members and other persons as it could secure to support its opposition to issuance of each such permit and that such other persons, while purportedly acting on behalf of themselves in said appearances, were acting on behalf of the defendants, which fact was not revealed to the Board;

(c) That all or substantially all of the persons who made an appearance before the Board in opposition to plaintiffs were members of defendants or were secretly solicited by defendants;

(d) That the defendants would threaten lack of political support to such Board members and other city officials who supported plaintiffs as were necessary;

(e) That defendants would engage in massive concerted action which was designed to engender public wrath against plaintiffs and which included, *inter alia*, the following activities:

(This footnote is continued on next page)

that defendants have sponsored two other administrative proceedings against McDonald's. This activity falls squarely within the protection of the *Noerr* immunity. The new complaint also alleges that defendants have made false and malicious statements to the news media for the purpose of engendering public wrath against McDonald's. But the nature of the statements is not disclosed, and nothing specifically alleged indicates that the statements were not genuinely intended to influence governmental action, like the publicity campaign held immune in *Noerr*. Finally, it is now alleged for the first time that the defendants have picketed existing McDonald's restaurants, interfering with deliveries and harassing customers. Like McDonald's other allegations, this one also is wholly conclusory. We are not told the nature or extent of the picketing, and no specific facts are alleged to indicate that, by virtue of its purpose or manner, the picketing falls outside the traditional protection afforded this activity by the First Amendment. *See Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 1968, 391 U.S. 308, 313-14.

(i) The knowing and malicious instigation and sponsorship, including financial support, by themselves and others acting secretly on their behalf of proceedings before the Human Rights Commission;

(ii) The knowing and malicious instigation and sponsorship, including financial support, by themselves and others acting secretly on their behalf of proceedings before the California Division of Labor Law Enforcement concerning business practices of McDonald's;

(iii) The dissemination of malicious and false statements through the news media designed to arouse public wrath against McDonald's;

(iv) Harassment of plaintiffs' customers at existing McDonald's restaurants; and

(v) Illegal picketing and disruption of the delivery of essential supplies to existing McDonald's restaurants."

The denial of either a motion under Rule 60(b)(6) or a motion for leave to amend may not be disturbed on appeal absent an abuse of the district court's discretion. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 1971, 401 U.S. 321, 330; *Komie v. Buehler Corp.*, 9 Cir., 1971, 449 F.2d 644, 647; *Vickery v. Fisher Governor Co.*, 9 Cir., 1969, 417 F.2d 466, 470; 3 Moore, Federal Practice ¶ 15.08(4). Because we agree with the district court that the additional material in the proposed second amended complaint adds little to the allegations of the first amended complaint, and because the second amended complaint would thus be subject to a motion to dismiss if filed, we cannot say that withholding leave to amend was an abuse of discretion. *See Vickery v. Fisher Governor Co., supra; DeLoach v. Woodley*, 5 Cir., 1968, 405 F.2d 496; *cf. Duggan v. International Association of Machinists*, 9 Cir., January 24, 1975, No. 73-1870.

In summary, we hold that the complaint charges nothing more than an agreement by the defendants to do that which, under *Noerr-Pennington*, they had a right to do. This action is in essence, an improper attempt to chill, indeed to prevent, the exercise of First Amendment rights. It was properly nipped in the bud by the trial judge.

Affirmed.

MARKEY, Chief Judge, United States Court of Customs and Patent Appeals (Concurring):

I concur in the excellent opinion of Judge Duniway. The presence of Judge Browning's strong and scholarly dissent, particularly its clear and forceful exposition of pleading considerations, prompts these few remarks.

I cannot find an allegation that defendants "did foreclose" free and unlimited access. Paragraph 18 alleges the defendants' opposition was a coverup of a "plan" to foreclose. Moreover, it would appear that McDonald's could not allege such foreclosure. It had full access. Whatever "free and unlimited" may mean, it cannot, in my view, require *successful* access or access *unopposed*. Nothing of record indicates that McDonald's feared defendants' opposition or that its freedom and ability to seek future permits was in any manner "chilled" by the expected opposition of defendants. On the contrary, as Judge Duniway's opinion makes plain, the present suit for $11,000,000 has an inherent chill factor with respect to defendants' freedom to oppose future permits.

In any event, the case illustrates, in my view, an effect of the unhappy marriage of "notice" pleading and virtually unlimited discovery.* The "might makes right" potential in that combination is, of course, completely contrary to the intent behind the effort to free the pre-trial phase from formalism and surprise.

In today's litigious milieu, a reversal based on rigid adherence to the Federal Rules of Civil Procedure herein is not likely to have a shock value sufficient to force reform. However that may be, I believe such an attractively conservative approach should await an instance in which the exercise of First Amendment rights of speech, association, and petition would not, as here, be so clearly impeded.

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*See National Conference of the Causes of Popular Dissatisfaction with the Administration of Justice, 70 *Federal Rules Decisions* 79 (1976).

BROWNING, Circuit Judge, dissenting:

As the majority succinctly puts it, McDonald's alleged that defendants combined "to oppose, repeatedly, baselessly and in bad faith, the granting of building permits by the San Francisco Board of Permit Appeals (Board) for the construction of McDonald's restaurants." McDonald's also alleged that defendants, by their repeated and baseless opposition to every McDonald's application, intended to and did foreclose McDonald's from "free and unlimited access" to the Board and "thereby interfere[d] directly with the business activities and relationships of a competitor." Complaint, paragraph 18.

These allegations, together with averments of anticompetitive purposes and effect, state an antitrust claim under *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972): "A combination of entrepreneurs to harass and deter their competitors from having 'free and unlimited access' to the agencies and courts, to defeat that right by massive, concerted, and purposeful activities of the group are ways of building one empire and destroying another. . . . If these facts are proved, a violation of the antitrust laws has been established." *Id.* at 515.

The majority finds this result unpalatable, and, to avoid it, distorts the substantive rule announced in *Trucking Unlimited* and applied in *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973), *on remand*, 360 F. Supp. 451 (D. Minn. 1973), *aff'd mem.*, 417 U.S. 901 (1974). The majority also creates an unwarranted exception to the standard for pleading laid down in the Federal Rules of Civil Procedure and forcefully restated in *Conley v. Gibson*, 355 U.S. 41, 45-48 (1957).

I

The majority assumes, though reluctantly, that defendants opposed the granting of building permits to McDonald's repeatedly, baselessly, and in bad faith, as alleged, and holds that, though deceptive, unethical, and undertaken to impose competitive injury, such conduct is immunized from the Sherman Act because it involves only the exercise of the First Amendment right of petition. The majority asserts that *Trucking Unlimited* applies only to defendants who have engaged in activities "external" to the administrative or judicial process (majority opinion note 4); and distinguishes *Otter Tail* on the ground that there the "gravamen" of the government's case was conduct by the defendants other than the instigation of litigation, a right guaranteed by the First Amendment. The majority's premise is that the Sherman Act cannot be violated by the exercise, in any manner or with any intent, of the First Amendment right to petition an administrative or judicial tribunal; some additional conduct is required, external to the proceedings before the tribunal.

Not only does the majority cite no authority for this rule, but *Trucking Unlimited* and *Otter Tail* are exactly to the contrary.

Trucking Unlimited holds as clearly as language can put it that the fact that defendants' conduct is protected by the First Amendment does not necessarily give them immunity under the antitrust laws, and that Sherman Act liability may be based upon no more than an abuse of the defendants' own First Amendment right of access to an administrative tribunal. *California Motor Transport Co. v. Trucking Unlimited, supra*, 404 U.S. at 413-15. The Court expressly holds that institution of baseless, repetitive claims, although an

exercise of the First Amendment right of petition, is an abuse of the administrative or judicial process that may evidence an intention to eliminate competition by barring competitors from meaningful access to adjudicatory tribunals, and thus violate the Sherman Act. *Id.* at 512-13, 515. The complaint in this case alleges precisely what *Trucking Unlimited* holds to be an antitrust violation. If there were any doubt as to the majority's meaning in *Trucking Unlimited,* it would be dispelled by the opinion of Justice Stewart who, with Justice Brennan, concurred in the judgment but declined to join the majority opinion specifically because the majority held that Sherman Act liability may be based upon the manner in which defendants exercise their First Amendment right of access to an adjudicatory tribunal. *Id.* at 517.[1]

In the *Otter Tail* litigation, the Supreme Court reaffirmed the doctrine that repetitious institution of proceedings before an adjudicatory tribunal may violate the Sherman Act if it reflects an intention to restrain competition by denying competitors meaningful access to the tribunal.

The case was before the Supreme Court twice. On the first occasion, as the majority notes, the Supreme Court simply remanded for reconsideration in light of *Trucking Unlimited.* In doing so, however, the Court stated without qualification that *Trucking Unlimited*

[1]The complaint alleges that the Board's function is adjudicatory. The majority suggests that it may in fact be legislative. The distinction is critical. *See* California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 512-13 (1972). *See also* Rodgers v. FTC., 492 F.2d 228, 232 n.3 (9th Cir. 1974). The question cannot be resolved on the present record. The majority assumes, as it must, that the Board is an adjudicatory body.

had held that the Sherman Act "may also apply to the use of administrative or judicial processes where the purpose to suppress competition is evidenced by repetitive lawsuits carrying the hallmark of insubstantial claims . . . ." *Otter Tail Power Co. v. United States, supra,* 410 U.S. at 380. This language contains no suggestion that conduct external to the litigation itself is also required to make out an antitrust violation.

The majority asserts that the Supreme Court's decision on the first appeal in the *Otter Tail* litigation is not a holding that the facts established an antitrust violation. This is literally true. It is also misleading. On remand, the district court held that the facts did make out a violation of the Sherman Act.[2] The defendant again appeal. In a second decision, not mentioned by the majority, the Supreme Court affirmed this holding. *Otter Tail Power Co. v. United States,* 417 U.S. 901 (1974).

The majority contends that *Otter Tail* involved not only actual litigation, but also threats of litigation, and thus satisfied the majority's dictum that conduct external to the exercise of the First Amendment right must be involved to forfeit antitrust immunity. Nothing in any of the opinions in the *Otter Tail* litigation suggests that the result reached depended upon the fact that threats were used. The opinions refer only

[2]On remand the district court found as follows:

> I find that the repetitive use of litigation by Otter Tail was timed and designed principally to prevent the establishment of municipal electric systems and thereby to preserve defendant's monopoly. I find the litigation comes within the sham exception to the *Noerr* doctrine as defined by the Supreme Court in *California Transport* . . . .

United States v. Otter Tail Power Co., 360 F. Supp. 451, 451-52 (D. Minn. 1973).

to a pattern of unsubstantial litigation employed to maintain a monopoly. An examination of the briefs filed in the Supreme Court for both appeals demonstrates that this was the crux of the charge. The government neither alleged nor proved that defendant employed threats of litigation as a planned part of defendant's program to maintain its monopoly, and the district court made no such finding.[3]

The defendants in *Trucking Unlimited* and *Otter Tail* did not lose antitrust immunity because they did anything in addition to participating in administrative and judicial processes. Immunity was lost because the defendants abused those processes by a pattern of conduct designed to eliminate competition by harassing and deterring competitors in their use of such processes and thus deny them meaningful access to such processes.

To repeat, there is no authority to support the majority's holding that abuse of administrative proceedings, although accompanied by the requisite intent, cannot alone constitute a violation of the Sherman Act; and *Trucking Unlimited* and *Otter Tail* hold to the contrary.[4]

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[3]The only reference to threatened litigation in the briefs submitted to the Supreme Court in the first *Otter Tail* appeal is found in a footnote in the Statement of Facts of the government's brief, in which two incidents that might be interpreted as involving such threats are described. Brief for the United States at 27 n.23. The same summary appears as footnote 9 at pages 11-12 of the Statement of Facts in the government's Motion to Affirm on the second appeal. It is frivolous to suggest that these incidental and ambiguous references formed the basis of the Court's ruling.

[4]It was unnecessary for appellants to allege that they were in fact foreclosed from access to the Board. It was neither alleged in the complaint in *Trucking Unlimited* nor proven in the trial in *Otter Tail* that the ability of competitors to present their views was actually foreclosed or that competitors were either prevented from filing applications with the tribunal or from obtaining a hearing. It is enough to allege a denial of meaningful access.

It was also unnecessary for appellants to allege that the defendants' submissions were baseless or that defendants did not seek favorable action by the adjudicatory body. The complaint in *Trucking Unlimited* "did not allege that the presentations defendants made to the agencies and the courts were in themselves false, misleading, or lacking in evidentiary or legal support," and the district court held that the "sham" exception was inapplicable for this very reason. Trucking Unlimited v. California Motor Transport Co., 432 F.2d 755, 762 (9th Cir. 1970). The antitrust defendants in both *Trucking Unlimited* and *Otter Tail* sought the favorable action of the tribunal when and if they could get it. The *Trucking Unlimited* complaint alleged that the antitrust defendants "instituted the proceedings and actions . . . *with* or without probable cause, and *regardless of the merits* of the cases." California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 512 (1972) (emphasis added). "Under this approach, the abusiveness of the petitioning practices is the key. The fact that in engaging in these practices the petitioner is actively seeking to influence the government decision-making is irrelevant." Note, Antitrust and the Constitution, 42 U. Cinn. L. Rev. 281, 304 (1973). As the court said in Semke v. Enid Automobile Dealers Ass'n, 456 F.2d 1361, 1366 (10th Cir. 1972), "Thus, the term 'sham' in this context would appear to mean misuse or corruption of the legal process." *See also* Rodgers v. FTC, 492 F.2d 228, 232 n.3 (9th Cir. 1974).

Even if it were relevant, the majority's assertion that "it is clear" that defendants were seeking official action is an unwarranted and premature factual determination. The district court made no such finding and there is no record to support it. As the Chief Justice warned in Scheuer v. Rhodes, 416 U.S. 232, 236 (1974):

> When a federal court reviews the sufficiency of a complaint, before the reception of any evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test.

II

The second rule announced by the majority is procedural. "What we do hold," the majority states, "is

that in any case, whether antitrust or something else, where a plaintiff seeks damages or injunctive relief, or both, for conduct which is prima facie protected by the First Amendment, the danger that the mere pendency of the action will chill the exercise of First Amendment rights requires more specific allegations than would otherwise be required."

Until the majority spoke, no complaint was subject to dismissal under Rule 12(b)(6) unless it failed to meet the liberal pleading standard of Rule 8(a). 5 C. Wright & A. Miller, Federal Practice & Procedure § 1356, at 590 (1969); *See Scheuer v. Rhodes,* 416 U.S. 232, 236 (1974); *Conley v. Gibson, supra,* 355 U.S. at 45-46; *Bodine Produce, Inc. v. United Farm Workers Organizing Committee,* 494 F.2d 541, 556 (9th Cir. 1974). This standard was applicable to all actions in federal courts, except those identified in Rule 9(b). 5 C. Wright & A. Miller, *supra,* § 1221, at 149. "[T]he rules reject the notion that certain actions inherently carry a different pleading burden than others." *Id.* at 151. Rule 9(b) requires greater particularity only in alleging fraud; and this exception to the general rule of notice pleading was to be "construed narrowly and not extended to other legal theories or defenses." 5 C. Wright & A. Miller, *supra,* § 1297, at 405.

The majority's exception to the general rule would apply to any case involving "conduct which is prima facie protected by the First Amendment." The number of cases within the exception is undoubtedly large, including most antitrust litigation. "The Sherman Act punishes the conspiracies at which it is aimed on the common law footing—that is to say, it does not make the doing of any act other than the act of

conspiring a condition of liability." *Nash v. United States,* 229 U.S. 373, 378 (1913). Thus the crux of an offense under section 1 of the Sherman Act is an agreement or meeting of minds, usually arising out of associations and communication among businessmen. *See Giboney v. Empire Storage Co.,* 336 U.S. 490, 502 (1949); *quoted in California Motor Transport Co. v. Trucking Unlimited, supra,* 404 U.S. at 514. Yet we have recognized that no special rules apply to the pleading of antitrust cases and have specifically rejected the notion that it is necessary to plead "facts" rather than "conclusions" in such cases.[5] *Walker v. Lucky Lager Brewing Co.,* 323 F.2d 1, 3-4 (9th Cir. 1963); *see Nagler v. Admiral Corp.,* 248 F.2d 319, 322-23 (2d Cir. 1957); 5 C. Wright & A. Miller, *supra,* § 1228, at 167.

The majority cites no authority to support its new rule. Three cases are referred to for the general proposition that the Supreme Court has "recognized the sensitivity of First Amendment guarantees to the threat of harassing litigation, and has erected barriers to safeguard those guarantees."[6] But none of these is a pleading case, and none suggest that the problem of protect-

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[5]The Supreme Court recently reversed the dismissal of an antitrust complaint for failure to state a claim upon which relief could be granted because the "concededly rigour standard" for such a dismissal was not met. Justice Marshall, speaking for a unanimous Court, explained that "in antitrust cases, where 'the proof is largely in the hands of the alleged conspirators,' Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 473 (1962), dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly." Hospital Bldg. Co. v. Trustees of the Rex Hospital, 98 S.Ct. 1848, 1853 (1976).

[6]Time, Inc. v. Hill, 385 U.S. 374 (1967); New York Times Co. v. Sullivan, 376 U.S. 254 (1964); and NAACP v. Button, 371 U.S. 415 (1963).

ing First Amendment rights from the chilling effect of harassing litigation should be solved by the creation of a judicial exception to the federal rules of pleading.

The majority quotes the discussion in *Blue Chip Stamps v. Manor Drug Stores,* 421 U.S. 723 (1975), of the danger of vexatious litigation under Rule 10b-5, particularly because of the potential for abuse of the discovery provisions of the Federal Rules of Civil Procedure in this type of case. But again, the Supreme Court's opinion offers no support for the creation by judicial fiat of an exception to the Federal Rules of Civil Procedure as a means of dealing with the problem.

The power to prescribe general rules of civil procedure for the district courts is vested in the Supreme Court; rules promulgated pursuant to this authority must be reported to Congress before becoming effective. 28 U.S.C. § 2072.

It is of course necessary that courts interpret and apply the rules in particular cases; but this court has no authority to announce what is in effect a substantial modification of the rules.

APPENDIX B.

Memorandum of Opinion.

In the United States District Court, for the Northern District of California.

Franchise Realty Interstate Corporation and McDonald's System of California, Inc., Plaintiffs, v. San Francisco Local Joint Executive Board of Culinary Workers, Bartenders and Hotel, Motel and Club Service Workers, an unincorporated association, et al., Defendants. No. C-73-0012 SW.

Plaintiffs Franchise Realty Interstate Corporation and McDonald's System of California, Inc., operate and license restaurants specializing in the sale of hamburgers. Defendants are the San Francisco Local Joint Executive Board of Culinary Workers, Bartenders and Hotel, Motel and Club Service Workers (Joint Board), the Golden Gate Restaurant Association, and the Hotel Employers Association of San Francisco.

While the parties would characterize this dispute as part of a life or death contest between free enterprise and collective bargaining, the facts material to these motions are as follows: Plaintiffs secured approval by the San Francisco Department of Public Works for construction of restaurants at three locations in San Francisco. The Department's decision was appealed to the Board of Permit Appeals by persons other than the defendants. Defendants appeared at the Board's public hearings and spoke against the permits. The content of defendants' arguments before the board is not made clear by the papers and it is not alleged that defendants were the sole opponents to the permits at the conclusion of the hearings. The Board reversed

the Department's approvals and withdrew the certifications.

Plaintiffs then instituted the present action alleging that defendants' efforts to influence the Board's decision constituted a conspiracy to restrain trade and commerce in violation of Section 1 of the Sherman Act. (15 U.S.C. § 1).

Defendants move severally for dismissal. Each argues that the acts they are alleged to have performed are protected under the First Amendment and the complaint thus fails to state a claim upon which relief can be granted, and that the court lacks jurisdiction to hear the cause because the complaint fails to allege acts constituting interstate commerce. The Joint Board argues, additionally, that as labor organizations its members are exempt from antitrust liability under *United States v. Hutcheson,* 312 U.S. 219 (1941) and related cases. Because resolution of the first issue is dispositive of these motions it is unnecessary to consider the latter two.

Defendants' alleged wrongful acts are set forth in their entirety in Paragraphs 16 and 17 of the amended complaint, which reads:

> "16. Beginning in or about early 1972, . . . and continuing thereafter up to and including the date of this complaint, defendants have combined and conspired to restrain trade and commerce in the restaurant business in the City and County of San Francisco in violation of Section 1 of the Sherman Act. . . .
>
> "17. The aforesaid combination and conspiracy has consisted of a continuing agreement and concert of action, the substantial terms of which have been and are:
>
> (a) That each defendant would appear before the Board of Permit Appeals of the City and County of San Francisco and would oppose each and every permit granted to the Company by the San Francisco Department of Public Works;
>
> (b) That each defendant would solicit appearance before the Board of such of its members and others as it could secure to support its opposition to issuance of each such permit;
>
> (c) That each defendant would threaten lack of political support to each Board member and other city officials who supported the Company."

In the opinion of this court these allegations constitute a textbook example of the type of activities protected by the First Amendment from antitrust liability. In *Eastern Railroad Conference v. Noerr Motors,* 365 U.S. 127 (1960), defendant, an association of railroads, was alleged to have clandestinely sponsored a comprehensive publicity campaign in support of laws unfavorable to the trucking industry with the sole purpose of reducing competition and restraining trade. The complaint sought specific damages for the truckers' loss of revenue due to the veto by the Governor of Illinois of the "Fair Trucking Bill" (which would have permitted trucks to haul heavier loads on public highways), for general damages, and for an injunction restraining defendants from disseminating any disparaging information about the truckers through third parties without disclosing defendants' sponsorship. Defend-

ants counterclaimed, alleging substantially identical activity on the part of the plaintiffs and seeking the same relief. The district court found that the information distributed by defendants' agent have been maliciously conceived distortions of fact. General damages were awarded and the broad injunctive relief sought was granted. The Court of Appeals affirmed the judgment. In a unanimous opinion the Supreme Court reversed, holding that:

> "We think it . . . clear that the Sherman Act does not prohibit two or more persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly. Although such associations could perhaps, through a process of expansive construction, be brought within the general proscription of 'combination[s] . . . in restraint of trade', they bear very little if any resemblance to the combinations normally held violative of the Sherman Act. . . ." 365 U.S. at 136.

If there is a difference between *Noerr* and the present case it is that the complaint here alleges acts less reprehensible than those which the Supreme Court there held immune from antitrust liability. In this case, as opposed to *Noerr*, the acts complained of are confined solely to influencing a single governmental agency. No widespread campaign to turn public wrath against McDonald's is alleged, nor does the complaint allege that defendants' arguments before the Board were based on ". . . distortion . . ., [the] manufacture of bogus sources of reference [or] distortion of public sources of information" as was the case in *Noerr*. *Id.* at 140.

Lastly, defendants here made no attempt to employ the third party technique to influence the Board, but made it quite clear who they were and what they wanted.

The *Noerr* principle was reaffirmed in *Mine Workers of America v. Pennington*, 381 U.S. 657 (1964). In that case the Court held that counterclaim defendants' successful solicitation of minimum wage regulations from the Secretary of Labor as part of their alleged overall conspiracy to drive counterclaimant to ruin was protected by the First Amendment.

Plaintiffs attempt to distinguish *Noerr* and *Pennington* on the theory that defendants' activities before the Board fall into the "sham" exception to the immunity as enunciated in *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1971) and *Otter Tail Power Co. v. United States*, 41 U.S.L.W. 4292 (February 22, 1973). The facts alleged here, however, even when read most favorably to the plaintiff, cannot be stretched to accommodate that theory. In *Trucking Unlimited* the parties were competitors in the trucking industry. The lengthy complaint alleged specific facts which indicated defendants

> ". . . [used their] power, strategy and resources . . . to harass and deter respondents in their use of administrative and judicial proceedings so as to deny them 'free and unlimited access' to those tribunals. The result, it is alleged, was that the machinery of the agencies and the courts was effectively closed to respondents, and petitioners indeed became 'the regulators of the grants of rights, transfers and registrations' to respondents—thereby depleting and diminishing the value

of the businesses of respondents and aggrandizing petitioners' economic and monopoly power." 404 U.S. at 511.

The Court held that the complaint stated a claim because it sufficiently alleged a sham on the part of the defendants and therefore fell outside the *Noerr-Pennington* doctrine. The distinction the court drew between the two factual situations is found on pages 511 and 512 of the report:

> "In the present case . . . the allegations are not that the conspirators sought 'to influence public officials,' but that they sought to *bar their competitors from meaningful access to adjudicatory tribunals* and so *usurp* that decisionmaking process. It is alleged that petitioners '*instituted* the proceedings and actions . . . with or without probable cause, and regardless of the merits of the cases.' The nature of the views pressed does not, of course, determine whether First Amendment rights may be invoked; but they may bear upon a purpose to deprive the competitors of meaningful *access* to the agencies and courts. As stated in the opinion concurring in the judgment, such a purpose or intent, if shown, would be 'to discourage and ultimately to prevent the respondents from invoking' the processes of the administrative agencies and courts and thus fall within the exception in *Noerr*." (Emphasis added).

The Court then cited a number of examples of sham activity such as conspiring *with* a licensing authority to eliminate a competitor, bribing a public official, filing a series of baseless, repetitive claims against a competitor (404 U.S. at 512-513), and concluded

that while the line between sham and bona fide exercise of First Amendment rights ". . . may be difficult to discern and draw, once it is drawn, the case is established that abuse of those processes produced an illegal result, *viz., effectively barring respondents from access to the agencies and courts.*" *Id.* at 513 (emphasis added).

The present complaint does not allege that defendants abused or circumvented the proceedings before the Board of Appeals; it does not allege defendants exercised any unlawful or extrinsic power over the Board or its members to gain a favorable decision. Nor does it allege any attempt (let alone a "concerted and massive" one) to block plaintiffs' access to the Board. The complaint alleges that plaintiffs and defendants met head-on before the Board and that plaintiffs lost.

Plaintiffs appear to confuse the sham exception to the *Noerr* doctrine with malicious or selfish intent on the part of the defendant. But *Noerr* and its progeny make clear that intent is irrelevant with respect to the immunity:

> "The right of the people to inform their representatives in government of their desires with respect to the passage or enforcement of laws cannot properly be made to depend upon their intent in doing so. It is neither unusual or illegal for people to seek action on laws in the hope that they may bring about an advantage to themselves and a disadvantage to their competitors." 365 U.S. at 139.

That proposition was amplified in Pennington.

> "Joint efforts to influence public officials do not violate the antitrust laws *even though intended to eliminate competition*. Such conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act." 381 U.S. at 670. (Emphasis added).

Otter Tail Power Co. v. United States, supra, cited by plaintiffs, adds little to the *Noerr* principle or the *California Trucking* sham exception, and nothing, in the opinion of the court, to plaintiffs' case here.

This complaint, reduced to its essence, states that plaintiffs wished to build restaurants in San Francisco, that the Board of Permit Appeals denied the permits notwithstanding their ability to comply with all laws, codes, ordinances and regulations of the City and County of San Francisco, and that the Board's decision was influenced by defendants' open opposition. It is apparent that if plaintiffs have been wronged they have been wronged by the Board of Permit Appeals; and that their remedy lies in the State courts and not by way of anti-trust relief in the federal court.

Accordingly, defendants' motions for dismissal under Rule 12(b)(6), Federal Rules of Civil Procedure, should be and hereby are GRANTED.

DATED: May 8, 1973.

/s/ Spencer Williams
UNITED STATES DISTRICT JUDGE

APPENDIX C.

Supplemental Order.

In the United States District Court for the Northern District of California.

Franchise Realty Interstate Corporation and McDonald's System of California, Inc., Plaintiffs, v. San Francisco Local Joint Executive Board of Culinary Workers, Bartenders and Hotel, Motel and Club Service Workers, an unincorporated association, et al., Defendants. No. C-73-0012 SW.

The motion of Plaintiffs Franchise Realty Interstate Corporation and McDonald's System of California, Inc. to set aside judgment and for leave to file second amended complaint was regularly heard on June 1, 1973. Blecher & Collins, by Maxwell M. Blecher, appeared as attorneys for Plaintiffs. Davis, Cowell and Bowe, by Alan C. Davis, appeared as attorneys for Defendant San Francisco Local Joint Executive Board. Rubenstein and Hawkins, by Michael Rubenstein, appeared as attorneys for Defendant Golden Gate Restaurant Association, and Steinhart, Goldberg, Feigenbaum & Ladar, by Neil Falconer, appeared as attorneys for Hotel Employers Association of San Francisco. The matter having been fully briefed and argued by the parties and the Court being fully advised in the premises,

IT IS HEREBY ORDERED that said motion should be and herein is denied.

Dated: June ....., 1973.

Spencer Williams
United States District Judge

APPENDIX D.

Order.

United States Court of Appeals for the Ninth Circuit.

Franchise Realty Interstate Corporation and McDonald's Systems of California, Inc., Plaintiffs-Appellants, vs. San Francisco Local Joint Executive Board of Culinary Workers, et al., Defendants-Appellees. No. 73-2727.

Filed: November 2, 1976.

Before: BROWNING and DUNIWAY, Circuit Judges, and MARKEY,* Chief Judge, United States Court of Customs and Patent Appeals.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing in banc.

The full court has been advised of the suggestion for in banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing in banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing in banc is rejected.

*Sitting by designation.

APPENDIX E.

Complaint for Damages and Injunctive Relief.

United States District Court, Northern District of California.

Franchise Realty Interstate Corporation and McDonald's System of California, Inc., Plaintiffs, v. San Francisco Local Joint Board of Culinary Workers, Bartenders and Hotel, Motel and Club Service Workers, Golden Gate Restaurant Association and Hotel Employers Association, Defendants. No. C-73-0012 SW.

Filed Jan. 3, 1973.

FRANCHISE REALTY INTERSTATE CORPORATION and McDONALD'S SYSTEMS OF CALIFORNIA, INC., plaintiffs herein, bring this action for damages and injunctive relief, and complain and allege as follows:

I

JURISDICTION AND VENUE

1. This claim is filed and these proceedings instituted under Sections 4 and 16 of the Clayton Act (15 U.S.C. 15, 26) to recover damages based on, and secure injunctive relief against, violations by the defendants, as hereinafter alleged, of Section 1 of the Sherman Act, as amended, (15 U.S.C. 1).

2. Defendants inhabit, maintain offices, transact business and may be found within the Northern District of California. The interstate trade and commerce involved and affected by the alleged violations of the antitrust laws is carried on in part within the Northern District of California. Defendants are within the jurisdiction of this Court for purposes of service of process.

II
THE PARTIES

3. FRANCHISE REALTY INTERSTATE CORPORATION (hereinafter FRIC) and McDONALD'S SYSTEMS OF CALIFORNIA, INC., are the plaintiffs herein. FRIC is a corporation organized and existing under the laws of the State of Illinois with its principal place of business in Oak Brook, Illinois. FRIC is a wholly owned subsidiary of McDonald's Corporation, also of Oak Brook, Illinois, whose subsidiaries operate family style restaurants under the name of McDonald's and license others to operate such restaurants throughout the United States (these company operated and licensed restaurants are hereinafter sometimes collectively referred to as "McDonald's restaurants"). FRIC is the corporate subsidiary through whom McDonald's Corporation secures sites on which such restaurants are built. Plaintiff, McDonald's Systems of California, Inc., is also a wholly owned subsidiary of McDonald's Corporation and an affiliate of FRIC (McDonald's Corporation, FRIC and McDonald's Systems of California, Inc. are sometimes hereafter referred to jointly as "the Company").

4. SAN FRANCISCO LOCAL JOINT BOARD OF CULINARY WORKERS, BARTENDERS AND HOTEL, MOTEL AND CLUB SERVICE WORKERS (hereinafter Joint Board) is hereby named a defendant herein. The Joint Board is an association of labor organizations, the members of which are employed in connection with the operation of restaurants, bars, hotels and motels and clubs. Joseph Belardi is the Executive Secretary of the Joint Board and acts as its spokesman.

5. GOLDEN GATE RESTAURANT ASSOCIATION AND HOTEL EMPLOYERS ASSOCIATION (hereinafter GGRA) is named a defendant herein. GGRA is a trade association composed of about two hundred fifty (250) restaurants and hotels which concerns itself, *inter alia*, with negotiating labor contracts with defendant Joint Board.

III
NATURE OF TRADE AND COMMERCE

6. Specializing in hamburgers, but offering other foods as well, McDonald's restaurants provide a clean atmosphere, serve no liquor, have no cigarette vending machines, and create an environment suitable to family dining. McDonald's restaurants have achieved a position of preeminence in the restaurant business while generally charging prices substantially less than most of the restaurants with which they compete. Still, the Company and its independent licensees have provided, in the past, and today continue to provide, food of the highest quality. This combination of high quality food at low prices in a friendly, clean, family atmosphere has contributed to an ever increasing demand for McDonald's products and locations.

7. Students who are, in many instances, members of minority races and ethnic groups are employed at substantially all McDonald's restaurants and thereby provided with an opportunity to complete or extend their education. The Company has found this program to be good for itself and good for these employees. Moreover, having young men and women serve has been widely accepted by the patrons of McDonald's restaurants.

8. Employees of McDonald's restaurants are not members of a labor union. As many of these employees are students who work only part time, they earn less than full time, labor union restaurant employees.

9. As the business of McDonald's restaurants continues to grow, and as they continue to serve high quality food at low prices in congenial family surroundings, competing restaurants, including many in San Francisco, have evidenced increasing concern about their inability to effectively compete with McDonald's restaurants.

10. The Company now operates two restaurants in San Francisco, California, one being at 1201 Ocean Avenue and the other at 1041 Market Street. These restaurants successfully compete with a wide variety of restaurants, cafeterias, hofbraus, etc., by using the format described above.

11. During the year 1971 the Company has applied for licenses within the City and County of San Francisco for the operation of restaurants at the following three locations:

(a) 1979 Mission Street

(b) 2299 Chestnut Street

(c) California & Hyde Streets

12. On each occasion the required permits have been approved by Department of Public Works, City and County of San Francisco certifying that in each instance the proposed restaurant would comply with all of the laws, codes, ordinances and regulations of the City and County of San Francisco.

13. In each instance, on the basis of the conduct hereinafter described to be unlawful and for the anti-

competitive purposes hereinafter described, the defendants, acting directly through their spokesman or through individual members have induced and persuaded the Board of Permit Appeals of the City and County of San Francisco to overrule the issuance of the permit and to deny to the Company the right to build and operate or license restaurants in each of the aforementioned locations.

14. The conduct of McDonald's restaurants involves the purchase of goods and commodities outside the State of California and the shipment of those goods and commodities into the State of California. The aforementioned restraints, described more fully hereinafter, have operated directly to prevent the movement of goods and commodities in interstate commerce and unless restrained by this Court will continue so to do. The combination and conspiracy, described hereinafter, has, therefore, directly and substantially, restrained and affected the flow of goods and commodities in interstate commerce.

IV

OFFENSE ALLEGED

15. Beginning in or about early 1972, the precise date being to plaintiffs unknown, and continuing thereafter up to and including the date of this complaint, defendants have combined and conspired to restrain trade and commerce in the restaurant business in the City and County of San Francisco in violation of Section 1 of the Sherman Act (15 U.S.C. 1).

16. The aforesaid combination and conspiracy has consisted of a continuing agreement and concert of action, the substantial terms of which have been and are:

(a) That each defendant would appear before the Board of Permit Appeals of the City and County of San Francisco and would oppose each and every permit granted to the Company by the San Francisco Department of Public Works;

(b) That each defendant would solicit the appearance before the Board of such of its members and others as it could secure to support its opposition to issuance of each such permit;

(c) That each defendant would threaten lack of political support to each Board member and other city officials who supported the Company.

17. The conduct described in paragraphs 15 and 16 herein was unlawful in that neither defendant was acting in good faith; instead the consistent, repeated and baseless opposition to the permits accorded the Company by the Department of Public Works was the product of a combination and conspiracy entered into for the explicit purpose of insulating restaurant operators in San Francisco from the competition of McDonald's restaurants and each such opposition was sham and frivolous in that by such opposition the defendants intended to and did no more than cover up a plan to foreclose the Company from free and unlimited access to the Department of Public Works and the Board of Permit Appeals of the City and County of San Francisco, and thereby interfere directly with the business activities and relationships of a competitor. Such opposition specifically undertook to injure and suppress the activities of a competitor who offered quality food at low prices in a family atmosphere.

18. Moreover, each defendant knew its activities to be unlawful and knew them to be a sham and frivolous in that each was well aware of the fact that the Company had intended to and did comply with all of the necessary code requirements, ordinances and regulations applicable to the conduct of its proposed restaurants and that the Board of Permit Appeals of the City and County of San Francisco had absolutely no authority, right, duty or responsibility to act as an economic board of review with the power to determine who and on what terms competition shall exist within the confines of San Francisco. Each defendant thus knew that by its plan of systematic, indiscriminate and wanton attack on the Company it was inducing, if not acting in concert with the Board of Permit Appeals (other than its President), to subvert the constitutional function of that Board and to do no more than frustrate McDonald's restaurants as a competitive factor in the City and County of San Francisco.

V

EFFECTS OF THE COMBINATION AND CONSPIRACY

19. The aforementioned combination and conspiracy has had, and unless restrained will continue to have, the following effects:

(a) Competition among and between restaurants in San Francisco has been substantially suppressed and eliminated;

(b) The efficacy of McDonald's restaurants as a competitive force in the restaurant business in San Francisco has been substantially curtailed;

(c) The general public has been denied the benefits of a full range of McDonald's locations

within San Francisco and has thus been denied the advantages of competition via high quality food at low prices in a wholesome family atmosphere which would otherwise have occurred;

(d) The students who are employed by McDonald's restaurants on a part time basis have been denied the employment opportunities which otherwise would have been presented and the substantial social and economic advantages which would otherwise have accrued to the community;

(e) Price competition in the sale and distribution of food products through restaurants in San Francisco has been substantially reduced and eliminated.

VI
INJURY TO PLAINTIFF

20. As a direct and proximate consequence of the combination and conspiracy hereinbefore alleged, as planned and calculated by defendants, plaintiffs have been deprived of profits it would otherwise have made and its good-will, image and reputation have been damaged and impaired, all to their damage in an approximate and reasonable amount of Three Million Seven Hundred Thousand Dollars ($3,700,000).

WHEREFORE, plaintiff prays that the Court adjudge and decree as follows:

A. Judgment be entered against defendants for $11,100,000, which is treble the amount of damages suffered by plaintiff as provided in Section 4 of the Clayton Act;

B. That defendants and each of them be perpetually enjoined from continuing the aforesaid combination and conspiracy;

C. Plaintiffs be awarded a reasonable attorney's fee, and costs of litigation as required by Section 4 of the Clayton Act;

D. For such other and further relief as the Court deems just and proper.

DATED: January 2, 1973.

BLECHER & COLLINS
MAXWELL M. BLECHER
HAROLD R. COLLINS, JR.
GARY W. HOECKER
By /s/ Maxwell M. Blecher
Maxwell M. Blecher
Attorneys for Plaintiffs

APPENDIX F.

Pertinent Excerpts From Proposed Second Amended Complaint for Damages and Injunctive Relief.

United States District Court, Northern District of California.

Franchise Realty Interstate Corporation and McDonald's Systems of California, Inc., Plaintiffs, v. San Francisco Local Joint Executive Board of Culinary Workers, Bartenders and Hotel, Motel and Club Service Workers, an unincorporated association, Golden Gate Restaurant Association, a corporation, and Hotel Employers Association of San Francisco, a corporation, Defendants. No. C-73-0012-SW.

FRANCHISE REALTY INTERSTATE CORPORATION and McDONALD'S SYSTEMS OF CALIFORNIA, INC., plaintiffs herein, demanding trial by jury, bring this action for damages and injunctive relief, and complain and allege as follows:

. . . .

IV
OFFENSE ALLEGED

16. Beginning in or about 1971, the precise date being to plaintiffs unknown, and continuing thereafter up to and including the date of this complaint, defendants have conspired and combined among themselves and with competing restaurant operators and with other persons as yet unknown to restrain trade and commerce in the restaurant business in the City and County of San Francisco in violation of Section 1 of the Sherman Act (15 U.S.C. 1).

17. The aforesaid combination and conspiracy has consisted of a continuing agreement and concert of

action, the substantial terms of which have been and are:

(a) Motivated by an intent to deter plaintiffs from pursuing building permits for restaurants and to effectively foreclose plaintiffs from free and unlimited access to the Department of Public Works and the Board of Permit Appeals, the defendants would appear before the Board of Permit Appeals of the City and County of San Francisco and would oppose each and every permit granted to the Company by the San Francisco Department of Public Works;

(b) The defendants would secretly solicit the appearance before the Board of such of its members and other persons as it could secure to support its opposition to issuance of each such permit and that such other persons, while purportedly acting on behalf of themselves in said appearances, were acting on behalf of defendants, which fact was not revealed to the Board;

(c) That all or substantially all of the persons who made an appearance before the Board in opposition to plaintiffs were members of defendants or were secretly solicited by defendants;

(d) That the defendants would threaten lack of political support to such Board members and other city officials who supported plaintiffs as were necessary;

(e) That defendants would engage in massive concerted action which was designed to engender public wrath against plaintiffs and which included, *inter alia*, the following activities:

(i) The knowing and malicious instigation and sponsorship, including financial support, by them-

selves and others acting secretly on their behalf of proceedings before the Human Rights Commission;

(ii) The knowing and malicious instigation and sponsorship, including financial support, by themselves and others acting secretly on their behalf of proceedings before the California Division of Labor Law Enforcement concerning business practices of McDonald's;

(iii) The dissemination of malicious and false statements through the news media designed to arouse public wrath against McDonald's;

(iv) Harassment of plaintiffs' customers at existing McDonald's restaurants; and

(v) Illegal picketing and disruption of the delivery of essential supplies to existing McDonald's restaurants.

18. The conduct described in paragraphs 16 and 17 herein was unlawful in that neither defendant was acting in good faith; instead the consistent, repeated and baseless opposition to the permits accorded the Company by the Department of Public Works was the product of a combination and conspiracy entered into the explicit purpose of insulating restaurant operators in San Francisco from the competition of McDonald's restaurants and each such opposition was sham and frivolous in that by such opposition the defendants intended to and did no more than cover up a plan to foreclose the Company from free and unlimited access to the Department of Public Works and the Board of Permit Appeals of the City and County of San Francisco, and thereby interfere directly with the business activities and relationships of a competitor.

Such opposition specifically undertook to injure and suppress the activities of a competitor who offered quality food at low prices in a family atmosphere.

19. Moreover, each defendant knew its activities to be unlawful and knew them to be a sham and frivolous in that each was well aware of the fact that the Company had intended to and did comply with all of the necessary code requirements, ordinances and regulations applicable to the conduct of its proposed restaurants and that the Board of Permit Appeals of the City and County of San Francisco had absolutely no authority, right, duty or responsibility to act as an economic board of review with the power to determine who and on what terms competition shall exist within the confines of San Francisco. Each defendant thus knew that by its plan of systematic, indiscriminate and wanton attack on the Company and its strong political position it was inducing, if not in concert with the Board of Permit Appeals (other than its President), to subvert and abuse the constitutional function of that Board and to do no more than frustrate McDonald's restaurants as a competitive factor in the City and County of San Francisco.

. . . .

DATED: May 16, 1973.

BLECHER & COLLINS
MAXWELL M. BLECHER
HAROLD R. COLLINS, JR.
GARY W. HOECKER
By /s/ Gary W. Hoecker
Gary W. Hoecker
Attorneys for Plaintiffs

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1023

FRANCHISE REALTY INTERSTATE CORPORATION and McDONALD'S SYSTEMS OF CALIFORNIA, INC.,
Petitioners,

vs.

SAN FRANCISCO LOCAL JOINT EXECUTIVE BOARD OF CULINARY WORKERS, BARTENDERS AND HOTEL, MOTEL AND CLUB SERVICE WORKERS, an unincorporated association; GOLDEN GATE RESTAURANT ASSOCIATION, a corporation; and HOTEL EMPLOYERS ASSOCIATION OF SAN FRANCISCO, a corporation,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION OF RESPONDENT SAN FRANCISCO LOCAL JOINT EXECUTIVE BOARD OF CULINARY WORKERS, BARTENDERS AND HOTEL, MOTEL AND CLUB SERVICE WORKERS, AN UNINCORPORATED ASSOCIATION

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OPINION BELOW

The opinion delivered in the Court below is reported at 542 F.2d 1076. The opinion was delivered on September 17, 1976 and Petitioners' Motion for Rehearing and Suggestion for Rehearing in Banc

were denied November 2, 1976. Petitioners' Petition was received by this Respondent on February 3, 1977.

JURISDICTION

Respondent San Francisco Local Joint Executive Board of Culinary Workers does not question the jurisdiction as set forth in the Petition.

QUESTIONS PRESENTED

Respondent Local Joint Board submits that the Questions presented herein are as follows:

1. Whether alleged concerted efforts to influence a policy-making governmental agency to take action adverse to the interests of the Petitioner are immunized from liability under the Sherman Act by the provisions of the First Amendment to the Constitution of the United States.

2. Whether a vague and conclusory pleading is appropriate in a case where a Petitioner seeks redress for conduct which is prima facie protected by the First Amendment and the pendency of which will chill the exercise of First Amendment Rights.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, First Amendment:

"Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right

of the people peaceably to assemble, and to petition the Government for a redress of grievances."

STATUTES INVOLVED

Sherman Act, Section 1 (15 U.S.C. §1):

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal. . . ."

Rule 8(a)(2), Federal Rules of Civil Procedure:

Rule 8. "(a) Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain . . . (2) a short and plain statement of the claim showing that the pleader is entitled to relief. . . ."

STATEMENT OF THE CASE

A. Nature of the case.

Petitioners are seeking a writ of certiorari from the opinion of the Court of Appeals which sustained the rulings of the District Court (1) granting Respondents' motion to dismiss on the ground that Petitioners failed to state a claim upon which relief can be granted and (2) refusing to allow Petitioners to file a Second Amended Complaint.

This is an antitrust action alleging a violation of Section 1 of the Sherman Act, originally filed on January 3, 1973, by two wholly owned subsidiaries of

McDonald's Corporation. An amended Complaint was filed on February 26, 1973.

One Petitioner is Franchise Realty Interstate Corporation (hereinafter FRIC), the company which allegedly secures sites on which McDonald's Restaurants are built. The second Petitioner is McDonald's Systems of California, Inc. (hereinafter MSC), a subsidiary of McDonald's Corporation, whose business is defined only generally by references in the Amended Complaint herein to the business activities of "the Company" (Petitioners' self designation).

The named Respondents are San Francisco Local Joint Executive Board of Culinary Workers, Bartenders and Hotel, Motel and Club Service Workers (hereinafter Local Joint Board), a labor organization, which by its very nature does not compete with Petitioners; the Golden Gate Restaurant Association (hereinafter G.G.R.A.), an association representing restaurants in San Francisco; and the Hotel Employers Association of San Francisco (hereinafter Hotel Employers), a corporation representing a number of hotels in San Francisco. This response is filed on behalf of Respondent Local Joint Board only.

Essentially, the Amended Complaint[1] complains of the action by the Board of Permit Appeals in the City and County of San Francisco in overruling the issuance of permits to subsidiaries of McDonald's Inc. The Board granted some permits and then denied the Petitioners "the right to build and operate

[1]The Amended Complaint is set forth at Appendix E of the petition herein.

licensed restaurants" at three locations in San Francisco. (Amended Complaint, ¶14). Thus, while already operating two other restaurants in San Francisco (Amended Complaint, ¶11), Petitioners apparently complain that Respondents successfully induced and persuaded the Board not to issue additional permits for the construction of restaurants in San Francisco. (Amended Complaint, ¶14).

The Amended Complaint further alleges that "consistent, repeated and baseless opposition" to the permits was "the product of a combination and conspiracy entered into with the explicit purpose of insulating restaurant operators in San Francisco from the competition of McDonald's Restaurants and each such opposition was sham and frivolous. . . ." (Amended Complaint, ¶18). The combination and conspiracy to restrain trade and commerce in the restaurant business in the City and County of San Francisco was allegedly in violation of Section 1 of the Sherman Act (Amended Complaint, ¶16).

Finally, the Amended Complaint alleges that the "Board of Permit Appeals of the City and County of San Francisco had absolutely no authority, right, duty or responsibility to act as an economic board of review with the power to determine who and on what terms competition shall exist within the confines of San Francisco," and that each Respondent was subverting "the contitutional function of the Board" and frustrating "McDonald's Restaurant as a competitive factor in the City and County of San Francisco." (Amended Complaint, ¶19).

B. Proceedings in the District Court.

Petitioners on January 3, 1973, filed their Complaint in the District Court and on February 26, 1973, Petitioners filed an Amended Complaint designed to correctly reflect the true names of the parties Defendant. Subsequent to the filing of the Amended Complaint, all three Respondents herein moved to dismiss the Complaint for failure to state a claim pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

The District Court heard oral argument on these motions to dismiss on April 27, 1973, and then took the matter under submission. On May 8, 1973, the District Court filed a Memorandum of Opinion (Appendix B to Petition), in which Respondents' motions were granted on the ground that the acts alleged in the Amended Complaint were protected from the antitrust laws under the First Amendment to the Constitution of the United States. On May 14 and 22, 1973, judgments were entered in favor of all Respondents.

At the hearing held on April 27, 1973 Petitioners declined the opportunity to amend their First Amended Complaint.[2] The District Court in its Memorandum of Opinions thereon did not include a provi-

[2]The following colloquy took place between Petitioners' counsel and the District Court at the oral argument on Respondents' motions to dismiss on April 27, 1973:

> The Court: In the event that I do rule in favor of the moving parties, do you feel you could amend your complaint or do you want to take a straight shot on appeal?
>
> Mr. Blecher: I would like to consult with my clients about it. My own reaction would be we can't state it any better than we stated it this time. (I RT at 24)

sion allowing for such amendment. Thereafter, Petitioners made a motion to set aside judgment and for leave to file a Second Amended Complaint. The District Court on June 1, 1973, following oral argument, denied the motion. Petitioners then filed their Notice of Appeal to the Court of Appeals for the Ninth Circuit.

C. Proceedings in the Court of Appeals.

The Ninth Circuit by its opinion of September 17, 1976, affirmed the District Court's dismissal of the Amended Complaint and its denial of leave to file a Second Amended Complaint. Petitioners' statement of the case distorts the Ninth Circuit's opinion in a light most favorable to their position. However, the opinion most articulately speaks for itself in holding that the Amended Complaint alleges only activities immunized from antitrust liability by the First Amendment and by its very vagueness constitutes a potential chilling effect upon the exercise of First Amendment Rights by these Respondents.

REASONS FOR DENYING THE WRIT

I. THE NOERR-PENNINGTON DOCTRINE IMMUNIZED THE CONDUCT UPON WHICH PETITIONERS SEEK RELIEF AND WAS PROPERLY APPLIED BY THE COURT OF APPEALS AND DISTRICT COURT IN REJECTING PETITIONERS' CLAIMS.

The majority of the Court of Appeals quite properly held the alleged conduct of this Respondent to be immunized from antitrust liability under the Sherman

Act by an overriding societal interest in the free expression of ideas and unimpeded opportunity to seek redress of grievances from officials of government. This immunity was first articulated by the unanimous Supreme Court in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 356 U.S. 127 (1961) *("Noerr")*, reiterated and refined by the Court in *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965) *("Pennington")*. There the Court held:

> *"Noerr* shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose . . .
>
> Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition. Such conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act." 381 U.S. at 670.

Petitioners' First Amended Complaint before the District Court, as well as its embellished proposed successor, allege nothing more of this Respondent than that it successfully engaged in such protected activity. Stripped of its conclusory allegations which are so vague as to be meaningless in any context, *Weiner v. Bank of King of Prussia*, 358 F.Supp. 684, 693 (E.D.Pa., 1973), Petitioners' complaints herein arise purely and simply from Respondents' repeated political opposition to Petitioners' restaurant business before the Board of Permit Appeals of the City and County of San Francisco. That alleged conduct is clearly immune from antitrust liability.

> "The right of the people to inform their representatives in government of their desires with respect to the passage and enforcement of laws cannot properly be made to depend upon their intent in doing so." *Noerr*, supra, at 139.

Indeed, despite Petitioners' attempts to construe it otherwise, this Court's decision in *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972), supports the decisions of the Court of Appeals and District Court herein.

First, *Trucking Unlimited* makes clear that the antitrust immunity articulated in the *Noerr* and *Pennington* cases applies not only to advocacy before legislative bodies and the executive branch of government but also to such conduct before the Courts and administrative agencies,

> "We conclude that it would be destructive of rights of association and of petition to hold that groups with common interests may not use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view respecting resolution of their business and economic interests vis-a-vis their competitors." 404 U.S. at 510-11.

Further, the Court held that the factual allegations of the Complaint in *Trucking Unlimited* enabled Petitioners there to overcome the *Noerr* immunity to antitrust laws. Those allegations set forth in specific detail a pattern of massive, concerted and purposeful conduct before governmental agencies by Respondents therein which was a sham designed to harass and deter Petitioners from access to those agencies. The

Court specifically held that Respondents decided to accomplish this objective, not by seeking to induce the PUC to change its policy, but rather, by discouraging the filing of applications with the PUC and ICC.

The nature of the Respondents' alleged conduct herein like that in *Noerr* and *Pennington* is precisely what immunizes it from antitrust liability. The Board of Permit Appeals of the City of San Francisco has a unique range of powers and duties. Section 3.651 of the Charter of the City and County of San Francisco defines the Board's functions and powers in terms so broad as to include review of every sort of permit issued or denied for whatever reason and at the instance of any person whether directly or indirectly affected thereby.[3] Its function is a classic example of democratic government and the important role that citizen communication plays therein. Under the Charter it performs a policy-making function rather than an administrative one.

Petitioners' sole complaint of this Respondent is that it appeared before the Board and opposed Petitioners' plans for restaurants both directly and indirectly through speaking and publishing its opposition in hearings and to members of the Board. Nowhere do Petitioners really allege that they were prevented from appearing and arguing their position. That they did so appear, present their case, and, on some occasions, lost is the price they must pay, albeit ungraciously, to conduct their business in a free society.

[3]Section 3.651 provides, in pertinent part:

"3.651 Functions, Powers and Duties

. . . [A]ny person who deems that his interests or property or that the general public interest will be adversely affected as a result of operations authorized by or under any permit or license granted or issued by any department may appeal to the board of permit appeals. Such board shall hear the applicant, the permit-holder, or other interested parties, as well as the head or representative of the department issuing or refusing to issue such license or permit, or ordering the revocation of the same. After such hearing and such further investigation as the board may deem necessary, it may concur in the action of the department authorized to issue such license or permit, or, by the vote of four members, may overrule the action of such department and order that the permit or license be granted, restored or refused."

Indeed, the Board of Permit Appeals perhaps best illustrates the Court's observation of the impact of the First Amendment in *Thomas v. Collins,* 323 U.S. 516 (1945). There it held,

> "It is not an accident or coincidence that the rights to freedom in speech and press were coupled in a single guaranty with the rights of the people peaceably to assemble and to petition for redress of grievance. All these, though not identical, are inseparable." 323 U.S. at 530.

The successful exercise of these rights to petition government is the sole wrong of which Petitioners complain and one completely immunized by the *Noerr* and *Pennington* decisions. The holdings in those cases recognize the preferred place that free expression must occupy in any judicial balance with other societal interests. *Thomas v. Collins,* supra, at 530, *Marsh v. Alabama,* 326 U.S. 501, 509 (1946), *Saia v. New York,* 334 U.S. 558, 561 (1948). Thus, the Court held in *Noerr,*

> "The right of the people to inform their representatives in government of their desires with respect to the passage or enforcement of laws can-

not properly be made to depend upon their intent in doing so. It is neither unusual nor illegal for people to seek action on laws in the hope that they may bring an advantage to themselves and a disadvantage to their competitors. . . . Indeed, it is quite probably people with just such a hope of personal advantage who provide much of the information upon which government must act.

We . . . hold that, at least insofar as the railroads' campaign was directed towards obtaining governmental action, its legality was not at all affected by any anticompetitive purpose it may have had." 365 U.S. at 139-140.

Nowhere in either the Amended Complaint or its proposed successor do Petitioners allege conduct by this Respondent which would remove that conduct from the protective shield of *Noerr* and *Pennington* on the basis of the so-called *Noerr* "sham" exception. As noted above, the mandate of the Board of Permit Appeals is to resolve broad questions of policy and not to operate as an administrator of policy predetermined by some statutory scheme. Thus the concern for the corruption of the administrative process by concerted efforts which underlies *Trucking Unlimited* and removed Respondents' immunity there is not present here.

The progeny of *Trucking Unlimited* clearly demonstrate that the absence of policy-making powers by the governmental entity sought to be persuaded by Defendants was a crucial factor in holding *Noerr* immunity to be inapplicable. In *Woods Exploration & Producing Company v. Aluminum Company of*

America, 438 F.2d 1286 (C.A. 5, 1971), *cert. den.,* 404 U.S. 1047, the Court found *Noerr* and *Pennington* immunity to be applicable because Respondents' conduct in falsifying forecasts to the Texas Railroad Commission was aimed at corrupting an administrative scheme rather than the formulation of policy. 438 F.2d at 1298. In *Israel v. Baxter Laboratories,* 466 F.2d 272 (C.A.D.C. 1972), the Court went so far in its concern for the integrity of the administrative process as to remand the matter to the Food and Drug Administration for further proceedings before ruling on Respondents' antitrust liability. 466 F.2d at 278-280.

Metro Cable Co. v. CATV of Rockford, Inc., 516 F.2d 220 (CA-7, 1975), cited by Petitioners is equally in accord with Respondents' position herein. There the Court holds that concerted action, even that which includes making or withholding monetary campaign contributions from members of the body sought to be influenced, is still immunized by *Noerr* and the First Amendment. 516 F.2d at 231.

The Court of Appeals herein succinctly held,

"The mere reversal of the grant of the three applications, at the urging of the defendants, suggests no more than 'that the plaintiffs and defendants met head-on before the Board and that plaintiffs lost,' as the district court noted in its opinion. The complaint fails to adduce any specific facts to support the conclusory allegation that defendants' opposition before the Board was 'sham' or 'frivolous'. This deficiency is hardly surprising, for we seriously doubt that any argument raised before the Board could be so characterized in view of the extremely broad standards

governing the exercise of that body's discretion." 542 F.2d at 1079.

If any damage has accrued to Petitioners it was at the hands of the Board. For such a wrong Petitioners have state remedies which have been exhausted outside these proceedings. Petitioners' efforts to expand this limited grievance into a multimillion dollar violation of the antitrust laws are thwarted by a complete absence of facts or legal authority to support such expansion. Petitioners cannot, by charging a conspiracy, turn what is basically a claim of violation of state law into a federal antitrust case. See *Sun Valley Disposal Co. v. Silver State Disposal Co.*, 420 F.2d 341 at 343 (C.A. 9, 1969). The Court of Appeals properly rejected this effort as should this Court.

II. THE STANDARD OF PLEADING IMPOSED BY THE COURT OF APPEALS IS BOTH PROPER AND CONSISTENT WITH THE FEDERAL RULES OF CIVIL PROCEDURE.

Petitioners' petition insinuates that a strict standard of pleading which the Court of Appeals found appropriate to such a frontal assault on Respondents' First Amended Rights flies in the face of the liberal pleading rules set forth in Rules 8 and 12 of the Federal Rules of Civil Procedure. In fact, the Court's holding strikes a careful balance between the "notice pleading" requirements of the Federal Rules of Civil Procedure and the paramount position of the First Amendment in our society. It is consistent with both of these larger interests and singularly appropriate to the factual situation presented herein.

The Court below held,

> "What we do hold is that in any case, whether antitrust or something else, where a plaintiff seeks damages or injunctive relief, or both, for conduct which is prima facie protected by the First Amendment, the danger that the mere pendency of the action will chill the exercise of First Amendment rights requires more specific allegations than would otherwise be required." 542 F.2d at 1082-83.

The conduct of this Respondent of which Petitioners seek to complain is well within the purview of the First Amendment. The *Noerr-Pennington* concepts of antitrust immunity have at their heart the pre-eminent societal interest in free expression of ideas to government officials. Such First Amendment rights are both "indispensable" to a free society. *Thomas v. Collins, supra,* at 530, and to be encouraged in the operations of its governmental institutions.

The Court of Appeals took careful note of the very real chilling effect that the pendency of litigation, or even the mere threat of litigation has upon the exercise of First Amendment rights by concerned citizens such as this Respondent. See generally *Time, Inc. v. Hill,* 385 U.S. 374, 389 (1967); *New York Times v. Sullivan,* 376 U.S. 254, 277 (1964). This chilling effect upon free expression has even greater and more ominous impact when deliberately directed at a labor organization which is by its very nature a vehicle by which workers effectively exercise their rights to free expression and association. See generally *Brother-*

hood of Railroad Trainmen v. Virginia, 377 U.S. 1, 5-6 (1964); *United Mine Workers of America v. Illinois State Bar Association,* 389 U.S. 217, 223 (1967).

The allegations of Petitioners' amended complaint are nothing more than a properly thwarted attempt to abuse the liberal, "notice pleading" requirements of Rule 8(a)(2) of the Federal Rules of Civil Procedure. By making only vague, conclusionary allegations about Respondents' conduct, Petitioners seek to force the facts of this case into the wholly inappropriate pleading mold of *Trucking Unlimited.* The courts below, however, have not been deceived by those transparently conclusionary allegations and properly have ignored them in examining and dismissing Petitioners' complaint on First Amendment grounds. See generally *Oppenhein v. Sterling,* 368 F.2d 516, 519 (C.A. 10, 1966) *cert. denied,* 386 U.S. 1011 (1967).

There is nothing in Rule 8 or elsewhere in the Federal Rules of Civil Procedure to suggest that the otherwise valid interest in liberal construction of pleadings was ever intended to override the freedoms of expression and belief secured by the First Amendment. Indeed, legions of authority suggest that, where the two are in conflict, the latter must prevail. *Thomas v. Collins, supra; Marsh v. Alabama, supra; Saia v. New York, supra.* Obviously, Petitioners had an opportunity to state their case below in detail in their first amended complaint. Interestingly, such detailed allegations are made with respect to many less crucial aspects of their claim.

On the crucial issue of activities which would remove the alleged conduct of Respondents from the protection of the First Amendment as articulated in the *Noerr* and *Pennington* cases, nothing but bald conclusions are set forth. Petitioners would have the Courts entertain this action with its chilling effect upon Respondents' exercise of their First Amendment rights without ever alleging any facts in support thereof.

The proposed second amended complaint offered by Petitioners was properly rejected as well. While somewhat more verbose than its discredited predecessor in its attempt to stifle freely expressed dissent to Petitioners' oppressive labor practices, it adds nothing but adjectives to the woefully deficient factual framework previously rejected by the District Court. While leave to amend is ordinarily freely given, it is within the discretion of the trial court to do so. Absent a showing of abuse of that discretion, its exercise will not be disturbed on appeal and should not be disturbed here. *Zenith Radio Corp. v. Hazeltine Research, Inc.,* 401 U.S. 321, 330 (1971).

Moreover, Petitioners were given an opportunity to amend their complaint by the District Court in the hearing on Respondents' motion to dismiss the first amended complaint and declined the offer in open Court (I R.T. at 24).[4] After such a refusal to amend and an examination of the absence of new substantial matter in the proposed second amended complaint, the Court properly concluded that nothing new was al-

[4]See Footnote 2, *supra.*

leged and leave was properly denied. *Downey v. Palmer,* 114 F.2d 116, 117 (C.A. 2, 1940); *Kirsch v. Barnes,* 157 F.Supp. 671, 672 (N.D.C.A. 1957) *aff'd* 263 F.2d 692 (C.A. 9, 1959).

Indeed, a review of the proposed second amended complaint and Petitioners' vacillating attitude toward offering amendment, indicates that said second amended complaint was not tendered in good faith. The oppressive chilling effect of this litigation upon the First Amendment rights of this Respondent is manifest. The tender of yet another totally baseless amended complaint after entry of judgment and the consequent burden of pursuing the obvious defenses thereto has the potential to further deter and prejudice Respondents in the exercise of those rights. Where such bad faith is present, leave to amend is properly denied. *Middle Atlantic Utilities Co. v. S.M.W. Development Corp.,* 392 F.2d 380, 384 (C.A. 2, 1968); *Strauss v. Douglas Aircraft Co.,* 404 F.2d 1152 (C.A. 2, 1968).

CONCLUSION

The ruling of the Court of Appeals herein does nothing more than reiterate the long-standing rule of law that the considerations of the Sherman Act are and must continue to be secondary to the protection of rights to free expression secured by the First Amendment. Nothing therein even suggests the legal calamity which Petitioners prognosticate in their petition. Indeed, the only legal calamity present in this

litigation has been the chilling effect that the defense hereof has had upon this Respondent's right to free expression of political opinion during its pendency and the potential future abuse which those rights will suffer should Petitioners be permitted to further pursue this baseless action. The petition for writ of certiorari should be denied.

Dated, February 22, 1977.

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In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1023

FRANCHISE REALTY INTERSTATE CORPORATION and McDONALD'S SYSTEMS OF CALIFORNIA, INC.,

Petitioners,

vs.

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Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Brief of Respondents Hotel Employers Association of San Francisco and Golden Gate Restaurant Association in Opposition to Petition for Writ of Certiorari

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OPINIONS BELOW

The Opinion of the Court of Appeals for the Ninth Circuit (Petition, Appendix A) is reported at 542 F.2d 1076; the Order of the Court of Appeals denying a rehearing and

1. Each of the three Respondents submitted separate memo-

rejecting the suggestion for a rehearing in banc (Petition, Appendix D) is unpublished. The Memorandum of Opinion of the District Court (Petition, Appendix B) is reported at 1973-1 Trade Cases ¶ 74,513. The Supplemental Order of the District Court (Petition, Appendix C) is unpublished.

JURISDICTION

The jurisdiction of this Court is invoked by Petitioners under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED[2]

1. Whether allegations that Respondents opposed Petitioners' applications for restaurant permits at public hearings before the San Francisco Board of Permit Appeals are sufficient to state a claim for violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, when accompanied only by conclusory allegations that such opposition was baseless, sham, frivolous and intended to foreclose Petitioners from free and unlimited access to said Board.

2. Whether the Court of Appeals erred in holding that Petitioners' complaint, based upon allegations of conduct *prima facie* protected by the First Amendment, must contain more specific allegations than would otherwise be required.

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randa and briefs in the courts below and, to some extent, raised different arguments. For the convenience of the Court, however, Respondents Hotel Employers Association of San Francisco and Golden Gate Restaurant Association join in this consolidated Brief in Opposition.

2. The questions which Petitioners purport to present for review by this Court do not accurately reflect the allegations of the Amended Complaint and the rulings of the courts below. Respondents respectfully submit that the questions set forth above more accurately describe the issues presented by the record.

STATUTES, RULES AND CHARTER PROVISIONS INVOLVED

The pertinent provisions of Section 1 of the Sherman Act, 15 U.S.C. § 1, and of Rule 8 of the Federal Rules of Civil Procedure are set forth in the Petition at pages 3-4.

Also involved in this case is Section 3.651 of the Charter of the City and County of San Francisco, setting forth the procedures governing review by the San Francisco Board of Permit Appeals:

> ". . . [*A*]*ny person who deems that his interests or property or that the general public interest will be adversely affected as a result of operations authorized by or under any permit or license granted or issued by any department may appeal to the board of permit appeals.* Such board shall hear the applicant, the permitholder, *or other interested parties,* as well as the head or representative of the department issuing or refusing to issue such license or permit, or ordering the revocation of the same. After such hearing and such further investigation as the board may deem necessary, it may concur in the action of the department authorized to issue such license or permit, or, by the vote of four members, may overrule the action of such department and order that the permit or license be granted, restored or refused." (Emphasis added.)

STATEMENT OF THE CASE

The Amended Complaint[3] alleges that Respondents appeared at public hearings during 1971 and successfully

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3. The original Complaint (Petition, App. E) was superseded by an Amended Complaint filed on February 26, 1973, which differed from the original Complaint only in the amendment of Paragraph 5 thereof and the addition of a new Paragraph 6 to reflect the separate identities of Respondents Golden Gate Restaurant Association and the Hotel Employers Association of San Francisco. Paragraph 6 of the original Complaint and all succeeding paragraphs were renumbered to reflect this change. References in this Brief and in the opinions below are to the paragraph numbers used in the Amended Complaint.

opposed certain applications by Petitioners for permits to build restaurants in San Francisco. As a result, Petitioners filed this $11,100,000 antitrust action against Respondents—an association of labor organizations, an association of restaurant owners and an association of hotel owners. Four years later, the lawsuit has not yet reached a conclusion and Respondents, despite the expenditure of considerable amounts of time and legal resources, are still threatened by the pendency of this action under a complaint resting, in essence, solely upon their alleged public appearances plus the allegation, in the most conclusory of terms, that such appearances and opposition were baseless, sham, frivolous and intended to foreclose Petitioners from access to the Board of Permit Appeals.

As the Court of Appeals recognized, the Board of Permit Appeals operates under an extremely broad mandate authorizing it to grant or refuse permits on the basis of "the general public interest" or of effects upon the "interests or property" of "any person"; there is virtually no restriction upon the persons entitled to be heard or the types of argument which may be advanced before the Board. (Section 3.651, Charter of the City and County of San Francisco,[4] discussed by the Court of Appeals at Petition, App. A, pp. 4-5) Proceedings before the Board are not conducted as simple two-party adversary adjudications limited to questions of compliance with local code requirements; they are open, public hearings at which political, economic, sociological, aesthetic and other positions may be (and frequently are) advanced. Such proceedings partake, in the words of the Court of Appeals, of all "the rough and tumble of the political arena." (Petition, App. A, p. 5)

4. Section 3.651, quoted in pertinent part above, broadly provides that any interested party may appear at hearings before the Board of Permit Appeals and that the issues to be considered at such hearings include matters affecting particular private interests as well as matters affecting the public interest.

The real nature of the controversy underlying this action is suggested in Paragraph 9 of the Amended Complaint, where it is alleged that Petitioners' employees *are not union members.* This controversy is, at its core, simply a dispute between labor unions and a non-union employer.[5]

The District Court, holding that the activities alleged in the Amended Complaint "constitute a textbook example of the type of activities protected by the First Amendment from antitrust liability" under *Eastern Railroad Presidents Conference v. Noerr Motor Freight,* 365 U.S. 127 (1961) and *United Mine Workers v. Pennington,* 381 U.S. 657 (1965), dismissed the Amended Complaint as to each Respondent for failure to state a claim upon which relief could be granted. (Petition, App. B)

After entry of judgment, Petitioners moved to set aside the judgment and for leave to file a *second* amended Complaint. After a hearing, both motions were denied. (Petition, App. C)

The judgment of dismissal was affirmed by the Court of Appeals, which held (a) that Respondents' activities, under applicable pleading standards, were immune from antitrust attack, and (b) that the District Court did not abuse its discretion in denying leave to amend. (Petition, App. A) A petition for rehearing and a suggestion for a rehearing in banc were denied and rejected, respectively, on November 2, 1976; *no judge of the Court of Appeals requested a vote on the suggestion for rehearing in banc.* (Petition, App. D)

5. This conclusion is reinforced by Petitioners' attempts, in their proposed Second Amended Complaint (see discussion in Section IV, below), to inject additional allegations concerning picketing, institution of proceedings before the California Labor Law Enforcement Division and the like.

REASONS FOR DENYING THE WRIT

I. The Courts Below Properly Interpreted and Applied This Court's Prior Decisions.

In recent years, this Court has turned its attention on four separate occasions to the question of the extent to which the exercise of First Amendment rights of petition, including attempts to influence the passage or enforcement of laws, are immune from antitrust liability. The resulting series of opinions has clearly delineated the contours of this immunity, and the implications of those opinions for the present case were clearly and correctly perceived by the courts below.

In *Eastern Railroad Presidents Conference v. Noerr Motor Freight*, 365 U.S. 127 (1961), arising out of a lobbying and public relations campaign by railroads seeking the adoption and enforcement of legislation restricting the trucking industry, this Court held, as a matter of statutory construction, that the Sherman Act does not apply to "mere solicitation of governmental action with respect to the passage and enforcement of laws." 365 U.S. at 138. The Court noted in dictum, however, that "[t]here may be situations in which a publicity campaign, ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor" and would therefore justifiably be subject to the Sherman Act. 365 U.S. at 144. Despite allegations of anticompetitive intent, misrepresentations and other activities going beyond mere attempts to influence legislation, the Court found no reason to doubt that the railroads were making a genuine effort to obtain governmental action.

Four years later, in *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965), this Court reaffirmed

the *Noerr* principle that "a concerted effort to influence public officials [is immune from the Sherman Act] *regardless of intent or purpose*," and held further that such concerted efforts are not illegal even "as part of a broader scheme itself violative of the Sherman Act." 381 U.S. at 670 (emphasis added).

In *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972), this Court resolved an area of uncertainty under *Noerr-Pennington* by holding that "[t]he same philosophy governs the approach of citizens or groups of them to administrative agencies . . . and to courts, the third branch of Government." 404 U.S. at 510. The Court also indicated that the *Noerr-Pennington* doctrine has First Amendment roots:

> "We conclude that it would be destructive of rights of association and of petition to hold that groups with common interests may not, without violating the antitrust laws, use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view respecting resolution of their business and economic interests vis-a-vis their competitors." 404 U.S. at 510-11.

After articulating these principles, the Court in *Trucking Unlimited* went on to elaborate upon the so-called "sham" exception to the *Noerr-Pennington* principle. The complaint in *Trucking Unlimited* included specific allegations that the defendants had instituted or appeared in administrative and judicial proceedings at every opportunity, regardless of the merits; had established a joint trust fund to finance such appearances; and had publicized this program to plaintiffs and others similarly situated. 404 U.S. at 518 (Stewart, J., concurring in the judgment). Based upon these specific and detailed allegations (404 U.S. at 511),

and upon further allegations that the purpose and intent of the alleged activity was to bar plaintiffs "from meaningful access to adjudicatory tribunals," the Court held that the allegations of the complaint fell within the "sham" exception to *Noerr-Pennington* as adapted to adjudicatory processes. 404 U.S. at 516.

The most recent case in this series is *Otter Tail Power Company v. United States*, 410 U.S. 366 (1973), opinion on remand, 360 F.Supp. 451 (D. Minn. 1973), summarily affirmed, 417 U.S. 901 (1974).[6] *Otter Tail* involved allegations of a wide range of anticompetitive conduct; the pertinent allegations for present purposes were that Otter Tail, in an effort to stifle the growth of municipally-owned utility systems within its service area, had adopted a policy of instituting or sponsoring litigation *which, by its very existence, made it impossible for the municipalities in question to market electric revenue bonds to finance their proposed power systems.* The possibility of success on the merits was not a significant factor in Otter Tail's decision to institute litigation, and in fact Otter Tail was unsuccessful in every lawsuit which it brought. 410 U.S. at 379, n.9. The District Court judgment for plaintiffs in *Otter Tail I* had been issued prior to *Trucking Unlimited* and had been based upon the assumption that *Noerr* principles were inapplicable to judicial proceedings; on this phase of the case, the Court simply remanded for reconsideration in light of *Trucking Unlimited*. 410 U.S. at 380.

Petitioners have contended throughout the proceedings in this case that the allegations of their complaint are

6. Petitioners fail to note the summary nature of this Court's affirmance in *Otter Tail II* (Petition, p. 13), and the limited precedential value which attaches to such an affirmance. See *Edelman v. Jordan*, 415 U.S. 651, 670-71 (1974).

sufficient to bring them within the "sham" exception to the *Noerr-Pennington* doctrine. Both of the courts below correctly perceived, however, that the facts alleged in this case bear not even a remote resemblance to the activities at issue in *Trucking Unlimited* and *Otter Tail;* instead, the facts alleged herein fall clearly within the zone of protected activities under the principles of *Noerr, Pennington* and *Trucking Unlimited*.[7]

In the first place, as the Court of Appeals recognized, proceedings before the Board of Permit Appeals in San Francisco partake more of "the rough and tumble of the political arena" than of the niceties of a highly structured judicial or administrative proceeding; in this regard, the court said, "we seriously doubt that any argument raised before the Board could be . . . characterized [as 'sham' or 'frivolous'] in view of the extremely broad standards governing the exercise of that body's discretion." (Petition, App. A, p. 4) Even if one assumes, however, that the complaint herein should be tested against the standards applicable to adjudicatory proceedings rather than legislative ones, there are many substantial distinctions to be drawn between the conduct constituting a "sham" in *Trucking Unlimited* and *Otter Tail* and the conduct alleged by Petitioners.

In this connection, it is instructive to look not only at what the complaint herein alleges, but at what it does *not*

7. Petitioners wholly misconstrue the opinion of the Court of Appeals in arguing that that opinion would require allegations that threats were communicated as part of a plan to deny access. (Petition, at 17) In fact, the Court of Appeals held only that activities external to *or abusive of* legislative, administrative or judicial processes, including (but not limited to) threats of opposition, *may* be a factor leading to the destruction of *Noerr*-type immunity. (Petition, App. A, pp. 10-11, n.4) As such, the holding of the Court of Appeals is squarely in line with this Court's prior decisions.

allege. The complaint does *not* allege that any of the Respondents compete with McDonald's; it does *not* allege that Respondents *initiated* any of the proceedings before the Board of Permit Appeals; it does *not* allege that Respondents' alleged conspiracy was *jointly financed*, or that it was financed at all (there is no allegation that attorneys for any of the parties herein were present at any of the hearings); it does *not* allege how *frequently* (if at all) each of the Respondents appeared before the Board, or what the *duration* or *content* of those appearances might have been; it does *not* allege that Respondents threatened to oppose each and every application which might be made in the future; it does *not* allege that McDonald's was *in fact* deterred or inhibited from continuing to seek restaurant permits, or that McDonald's was in any way denied the opportunity to make a full presentation of its position to the Board. (Even if such an allegation were made, it is wholly implausible to suggest that a large corporation with the size and resources of McDonald's could readily be deterred by such opposition.)

Finally, the complaint does not allege (because it *cannot* allege) that Respondents were unsuccessful in their efforts. In *Otter Tail,* the defendant's consistent lack of success on the merits clearly permitted the inference that the defendant was engaged in just the type of "pattern of baseless, repetitive claims" condemned in *Trucking Unlimited* (404 U.S. at 513). Where, as in the instant case, a defendant has instead met with uniform success in its opposition on the merits, such success compels the inference that such opposition was both genuine and meritorious. (Petition, App.A, p. 5; *cf. Noerr,* 365 U.S. at 144-45.)

The Court of Appeals accurately perceived that the present case is, in one sense, a "through the looking glass" version of *Otter Tail*:

> "In [*Otter Tail*], whenever a community sought to go into the power business, Otter Tail sued. The effect of the mere filing of the action destroyed the community's ability to proceed. Nobody would buy its bonds while the action was pending. Mere filing was enough to accomplish Otter Tail's purpose. In our case, that is not so. Mere opposition would not defeat McDonald's purpose; to do that, defendants had to persuade the Board to rule in their favor—and it is alleged that they succeeded. The only bit of *in terrorem* litigation here is McDonald's action, an avowed purpose of which is to eliminate opposition, even the defendants' successful opposition, to its desires before the Board." Petition, App. A, pp. 17-18.

The position for which Petitioners contend (a position wisely rejected by the courts below) would permit an unscrupulous entrepreneur, by the filing of lawsuits based upon the most conclusory allegations of "denial of access" and the like, to deter or intimidate members of the public and competing businessmen alike from raising any opposition before public tribunals by imposing heavy litigation expenses and threats of liability for damages upon those who have the temerity to exercise their First Amendment rights in the form of legitimate appearances before public bodies. This Court's prior decisions clearly protect First Amendment rights in such circumstances. In the words of the Court of Appeals:

> "This action is, in essence, an improper attempt to chill, indeed to prevent, the exercise of First Amendment rights. It was properly nipped in the bud by the trial judge." (Petition, App. A, p. 20)

II. The Decision Below Does Not Conflict with Any of the Other Court of Appeals Decisions Cited by Petitioners.

Petitioners, in a vain effort to demonstrate some basis for review by this Court, suggest that the opinion below conflicts with decisions of the Courts of Appeals of several circuits. (Petition, pp. 20-21) A review of the cases relied upon by Petitioners, however, discloses that none of them conflicts in any respect with the principles discussed and applied by the court below. By lifting certain quotations out of context and ignoring their factual underpinnings, Petitioners have simply attempted to create the illusion of conflict.

Petitioners have relied, throughout these proceedings, upon *Harman v. Valley National Bank of Arizona*, 339 F.2d 564 (9th Cir. 1964), involving allegations that the defendants had induced the Arizona Attorney General to initiate an action to place a savings and loan institution in receivership. Petitioners fail to mention that in *Sun Valley Disposal Co. v. Silver State Disposal Co.*, 420 F.2d 341 (9th Cir. 1969), the Ninth Circuit itself characterized the authority of *Harman* as having been "eroded" and "lessen[ed]" by *Pennington.* (420 F.2d at 342) *Sun Valley* arose out of a dispute over the granting of an exclusive garbage collection franchise by the Board of County Commissioners. Affirming dismissal of the complaint on *Noerr-Pennington* grounds, the Ninth Circuit noted that this appeared to be simply an instance of "valid municipal action . . . without the scope of the federal antitrust laws" (420 F.2d at 342), and that in any event the Sherman Act was not intended to regulate the effects of personal interest and outside influences upon the actions of local governmental units such as city councils and county boards (*id.*):

> "A plaintiff cannot, by charging a conspiracy, turn what is basically a claim of violation of state law into a federal antitrust case." 420 F.2d at 343.

Metro Cable Co. v. CATV of Rockford, Inc., 516 F.2d 220 (7th Cir. 1975), one of the alleged conflicts cited by Petitioners, is similar in many respects to *Sun Valley*; moreover, Petitioners concede that the quotation from *Metro Cable* upon which they rely is mere dictum (Petition, p.21). Plaintiff in *Metro Cable* was an unsuccessful applicant for a cable television franchise in Rockford, Illinois; defendants, the successful applicants, were alleged to have conspired with the mayor and with an alderman to induce the city council both to deny the requested franchise to plaintiff and even to deny hearings on plaintiff's applications. The Court of Appeals, in affirming dismissal of the complaint on *Noerr-Pennington* grounds, noted in dictum that certain abuses of adjudicative processes may be illegal under the antitrust laws, 516 F.2d at 228. The court went on to conclude, however, that *the granting of a cable television franchise was a legislative act by the city council and occurred in a political setting*—the council was open to arguments from any source, was not obliged to compile a formal evidentiary record and was unquestionably subject to lobbying and political influence. *Id.* Under such circumstances, the court found the bare allegation that the mayor and alderman were conspirators to be irrelevant,[8] as was the

8. Petitioners, citing *Harman,* point to an allegation "that defendants *may have* acted in concert with the Board (other than its President)." (Petition, p. 16; emphasis added.) The complaint contains no other allegation of any participation by Board members in the alleged conspiracy. Such vague innuendo is patently insufficient to justify any reliance upon cases alleging official participation in a conspiracy (assuming, for the moment, that such cases have any vitality after *Sun Valley* and *Metro Cable*).

allegation that defendants obtained the support of city officials by making campaign contributions. 516 F.2d at 229-31. Finally, the court noted that the injury alleged by plaintiff was caused by precisely the governmental actions which defendants had *genuinely* and *successfully* sought to induce the city council to take. 516 F.2d at 229. If anything, *Metro Cable supports* the decision below.

Woods Exploration & Producing Co. v. Aluminum Co. of America, 438 F.2d 1286 (5th Cir. 1971), *cert. den'd* 404 U.S. 1047 (1972), arose out of a dispute over natural gas production quotas. The complaint alleged in part that defendants were filing false production forecasts for use by the Texas Railroad Commission in establishing quotas for certain fields. The Court of Appeals, in reversing a grant of partial summary judgment, held that the filing of false *factual* data is very different in kind and in effect from the making of misleading or exaggerated *arguments*; the latter constitutes a form of advocacy clearly protected under *Noerr* and its progeny, while the former constitutes a serious abuse of the administrative process and enjoys no such immunity. 438 F.2d at 1294-95. Nowhere does the complaint herein allege any such factual misrepresentations by Respondents.

Israel v. Baxter Laboratories, Inc., 466 F.2d 272 (D.C. Cir. 1972) is clearly distinguishable on similar grounds. The complaint in *Israel* alleged a conspiracy to keep plaintiffs' drug Cothyrobal from the market by influencing the Food and Drug Administration (FDA) to deny fair consideration to plaintiffs' new drug applications. Among the activities allegedly engaged in by defendants in *Israel* were the suppression, concealment and misconstruction of information concerning Cothyrobal and a competing drug then before the FDA; for the same reasons set forth in *Woods,*

such tampering with the factual processes of an administrative body cannot be countenanced.[9] The present case, however, contains no allegations of such tampering.[10]

In short, even if the Board of Permit Appeals were regarded as an administrative agency committed to "fair and impartial functioning" on the basis of a detailed factual record, the allegations in the instant case are not sufficient to bring Petitioners within the reasoning of *Woods* and *Israel,* and given the wide-open and political nature of the proceedings before the Board of Permit Appeals, there is substantial doubt that such cases can be regarded as relevant precedent in any event.

The final alleged conflict cited by Petitioners is *Semke v. Enid Automobile Dealers Assn.,* 456 F.2d 1361 (10th Cir. 1972)—again, Petitioners concede that their quotation from *Semke* is mere dictum (Petition, p. 21). Defendants in *Semke* were alleged to have persuaded the Oklahoma Motor Vehicle Commission to seek and obtain an injunction, subsequently affirmed by the Oklahoma Supreme Court, against certain car-purchasing services provided by plaintiff. The Court of Appeals noted in dictum that misuse or corruption of legal processes would not be immune under *Noerr-Pennington.* 456 F.2d at 1366. The court went on to state, however, that "the utilization of the court or administrative agency in a manner which is in accordance with the spirit of the law continues to be exempt from the antitrust laws,"

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9. It is significant to note that the remedy adopted by the court in *Israel* was, in part, to remand so that plaintiffs could reactivate their applications for further consideration by the FDA. No such remedy is called for in the instant case, since there is no contention that the Board of Permit Appeals gave less than full consideration to Petitioners' applications.

10. *Israel,* like *Metro Cable* and *Harman,* included allegations that a government official conspired with the defendants. No such factor is present here. See discussion in note 8, *supra.*

and held that the facts in *Semke* showed simply that defendants had used state processes in precisely the manner in which such processes were intended to be used. 456 F.2d at 1366-67.

In summary, a review of the Court of Appeals decisions relied upon by Petitioners demonstrates no conflict at all, but rather a substantial consistency and uniformity in the interpretation of this Court's decisions and in their application to various types of governmental processes.

III. The Pleading Standards Applied by the Court of Appeals Are Neither "Special" Nor Unique, and Are Amply Supported by Precedent.

The Court of Appeals held, in part, "that in any case, whether antitrust or something else, where a plaintiff seeks damages or injunctive relief, or both, for conduct which is prima facie protected by the First Amendment, the danger that the mere pendency of the action will chill the exercise of First Amendment rights requires more specific allegations than would otherwise be required." (Petition, App. A, p. 13) For the reasons demonstrated in Section IV, *infra*, this holding is not essential to the resolution of this case—the complaint is deficient under any pleading standard. Nevertheless, the standard articulated by the Court of Appeals is not by any means the "radical departure" which Petitioners suggest.

Courts in recent years have shown an increasing sensitivity to the substantial burdens which can be thrust upon defendants by the combination of liberal pleading rules and liberal discovery policies. See, *e.g., Blue Chip Stamps v. Manor Drug Stores,* 421 U.S. 723, 739-41 (1975), quoted in the opinion below at Petition, App. A, pp. 14-16; *National Conference on the Causes of Popular Dissatisfaction With the Administration of Justice,* 70 F.R.D. 79 (1976); Petition, App. A, pp. 20-21 (Markey, J., concurring). Under such circumstances, the requirement that a complaint based upon activities involving the exercise of First Amendment rights set forth the basis for relief with greater than usual specificity is but a reasonable compromise between the notice pleading policy of the Federal Rules and the "breathing space" necessary to protect First Amendment freedoms.

Decisions of this Court in substantive areas such as invasion of privacy, libel and other fields of state regulation which touch upon First Amendment freedoms have long shown a sensitivity to the need for making such accommodations. See, *e.g., Time, Inc. v. Hill,* 385 U.S. 374 (1967); *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964); *NAACP v. Button,* 371 U.S. 415 (1963). Similarly, numerous decisions in the Fifth Circuit have recognized that the protection of First Amendment freedoms requires an increased sensitivity in dealing with the assertion of long-arm jurisdiction over out-of-state defendants in libel actions: "First Amendment considerations surrounding the law of libel require a greater showing of contact to satisfy the due process clause than is necessary in asserting jurisdiction over other types of tortious activity." *New York Times Co. v. Connor,* 365 F.2d 567, 572(5th Cir. 1966); *Edwards v. Associated Press,* 512 F.2d 258, 266-68 (5th Cir. 1975). See also *United States v. Lattimore,* 127 F.Supp. 405, 407 (D.C.D.C. 1955), applying "exacting scrutiny" to the sufficiency of an indictment based upon activities in the First Amendment area.

A similar trend can be discerned in the application of pleading principles in actions brought under 42 U.S.C.

§ 1983 and other civil rights statutes. Recognizing the increasing volume of such suits and the potential which they offer for harassment or intimidation of state officials, courts have shown a significant willingness to look beyond conclusory allegations of intentional or wilful conduct, racial discrimination, conspiracy or arbitrary denial of access to the courts, and to require that a plaintiff present more specific factual allegations in support of such conclusions. See, *e.g., Ogletree v. McNamara,* 449 F.2d 93, 98 (6th Cir. 1971) ("Liberal as are the federal rules of pleading, something more than conclusory allegation of systematic racial discrimination is required. Some facts as to when, how, to whom and with what results such discrimination has been applied would seem a minimum required for 'a short and plain statement of the grounds upon which the court's jurisdiction depends.' "); *Curtis v. Everette,* 489 F.2d 516, 521 (3d Cir. 1973), *cert den'd* 416 U.S. 995 (1974) ("This court has repeatedly held that conclusory allegations, such as 'intentionally, wilfully and recklessly,' without supporting facts are not sufficient to make out a complaint under 42 U.S.C. § 1983."); *Guedry v. Ford,* 431 F.2d 660, 664 (5th Cir. 1970) ("Plaintiff's allegation that a conspiracy existed between all the captioned defendants is conclusionary in nature and unsupported by any pleaded facts and hence insufficient to constitute a basis for relief."); *Finley v. Rittenhouse,* 416 F.2d 1186, 1187 (9th Cir. 1969); *United States ex rel. Hoge v. Bolsinger,* 311 F.2d 215, 216 (3d Cir. 1962), *cert den'd* 372 U.S. 931 (1963). These cases illustrate that where significant rights of the defendant or important concerns of judicial administration are involved, courts will require something more than the barest, conclusory "notice pleading" of the plaintiff's claim.

When viewed in the context of such precedents, the holding of the Court of Appeals is seen to be neither novel nor unsupported.[11]

IV. Even Under the Most Liberal Construction of the Pleadings, the Complaint Fails to State a Claim.

The only specific activities alleged in the Amended Complaint are a series of appearances at public hearings, the solicitation of similar appearances by others and the threatening of withdrawal of political support from Board members. Joined with these allegations of specific conduct are conclusory allegations that such activities were performed baselessly, with anticompetitive intent, and with the intent to deny Petitioners access to the Board.

Cases such as *Ogletree, Curtis* and *Guedry,* cited in the preceding section, provide ample authority for disregarding such conclusory allegations in evaluating the sufficiency of a complaint, even under ordinary pleading standards which take no account of the involvement of First Amendment rights. For this reason, the present case provides an inadequate vehicle for reaching the First Amendment pleading issue presented by Petitioners.

Petitioners' arguments concerning the sufficiency of the Amended Complaint, and their efforts to convince this Court to review that complaint under *Noerr-Pennington*

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11. *Hospital Building Co. v. Trustees of Rex Hospital,* ..... U.S. ....., 98 S.Ct. 1848 (1976), cited by Petitioners, is not to the contrary. *Rex Hospital* was a straightforward antitrust case without First Amendment overtones. Moreover, the issue at stake in *Rex Hospital* (effects upon interstate commerce) is one as to which Congress intended to give the Sherman Act the broadest possible scope. *Cf. United States v. South-Eastern Underwriters' Assn.,* 322 U.S. 533, 557-59 (1944). *Noerr* itself is ample evidence that no such Congressional policy is to be inferred where First Amendment rights are involved.

standards, are further complicated by facile references to the "proposed second amended complaint" (Petition, pp. 6, 16 and App. F) as if the provisions of that version of the complaint were properly before this Court. In fact, the District Court denied Petitioners' motion for leave to file a Second Amended Complaint (Petition, App. C) and the Court of Appeals held that the District Court had not abused its discretion in so doing.[12] (Petition, App. A, pp. 18-20) Both courts reviewed Petitioners' proposed amendments and concluded that they added nothing of value or substance to the allegations of the Amended Complaint. Moreover, Petitioners have not chosen to raise the propriety of the District Court's denial of leave to amend among their Questions Presented. Again, this muddying of the waters by Petitioners makes the case an unsatisfactory vehicle for review of the issues resolved below.

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12. The District Court's denial of leave to amend was supported in part by the following colloquy, which took place between petitioners' counsel and the District Court at the oral argument on Respondents' motions to dismiss on April 27, 1973:

> THE COURT: In the event that I do rule in favor of the moving parties, do you feel you could amend your complaint or do you want to take a straight shot on appeal?
>
> MR. BLECHER: I would like to consult with my clients about it. *My own reaction would be we can't state it any better than we stated it this time.*

(I R.T. at 23-24; emphasis added.) On the basis of this colloquy, it was clearly proper for the courts below to assume that Petitioners had no valid basis for further amendment, and to view with suspicion any subsequent effort to inject additional elements into the case.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

DATED: February 23, 1977.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1023

FRANCHISE REALTY INTERSTATE CORPORATION and
McDONALD'S SYSTEMS OF CALIFORNIA, INC.,
Petitioners,

vs.

SAN FRANCISCO LOCAL JOINT EXECUTIVE BOARD OF CULINARY WORKERS, BARTENDERS AND HOTEL, MOTEL AND CLUB SERVICE WORKERS, an unincorporated association, GOLDEN GATE RESTAURANT ASSOCIATION, a corporation, and HOTEL EMPLOYERS ASSOCIATION OF SAN FRANCISCO, a corporation,
Respondents.

MOTION FOR LEAVE TO FILE A BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI AS AMICI CURIAE
and
BRIEF FOR ERNEST W. HAHN, INC., ET AL., IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI AS AMICI CURIAE

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Dated: March 8, 1977

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Respondents.

On Petition for a Writ of Certiorari

MOTION OF ERNEST W. HAHN, INC. AND CLIPPER EXXPRESS FOR LEAVE TO FILE A BRIEF, AS AMICI CURIAE

The above-named corporations hereby respectfully move the Court for leave to file a brief annexed hereto, as *amici curiae,* in support of the Petition for a Writ of Certiorari. Applicants requested the consent of the Petitioners and of the Respondents to file a brief as *amici curiae.* Petitioners, Franchise Realty Interstate Corporation, et al., granted their consent. Respondents refused their consent.

The case now before this Court will almost certainly control the outcome of two private, treble damage actions in which Applicants are plaintiffs.* Applicants' cases involve many of the same basic legal

Ernest W. Hahn, Inc. v. Hugh B. Codding and Codding Enterprises (N.D. Cal. No. C 75 2706 [WWS] and *Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc., et al.* (N.D. Cal. No. C 72 863 [AJZ]).

issues as those presented by the case now before the Court. There are, however, significant factual differences among these cases, and Applicants rest their motion for leave to file a brief as *amici curiae* as much upon those differences as upon the similarities. Applicants desire to present arguments and viewpoints which the parties themselves will probably not present.

The instant case raises issues of grave importance to the effectiveness of antitrust policy and enforcement. The rulings of the majority in the court below emasculate the controlling authorities and render necessary further definition, by this Court, of the manner and extent to which conspirators and would-be monopolists may use the judicial and adjudicatory processes of government to destroy competitors or create artificial barriers to market entry. The present case displays one variety of such abuse, but there are many others. Applicants believe that it will be of assistance to this Court, in framing a rule of general application, to have before it a discussion of other types of cases involving the abuse of the adjudicatory processes for anticompetitive purposes. Indeed, one of the central precedents in this area, *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 139 (1961), itself stresses the importance to governmental decision makers of a flow of information and views provided by persons with an interest in the outcome of the proceedings. Applicants hope to serve that function here.

Applicant Ernest W. Hahn, Inc. (hereafter "Hahn") is engaged in commercial real estate development, including regional shopping centers. Hahn

is plaintiff in *Ernest W. Hahn, Inc. v. Hugh B. Codding, et al.*, a Sherman Act treble damage action now pending in the United States District Court for the Northern District of California. The original complaint in that case alleged that Hahn had successfully negotiated an agreement with the Urban Renewal Agency of the City of Santa Rosa, California, to serve as the private developer of a regional commercial shopping center as an integral part of the Agency's downtown urban renewal project. It was further alleged that the Agency proposed to issue certain municipal bonds to finance the acquisition and preparation of the renewal project area prior to redevelopment. The defendants, Hugh B. Codding and Codding Enterprises, are alleged to possess a dominant position in the relevant market of "the development, construction and operation of commercial shopping centers within Sonoma County, State of California".

The defendants, aware that the pendency of litigation challenging agency action would preclude issuance of the municipal bonds necessary to finance the project, were alleged to have "agreed and conspired to file a series of overlapping, repetitive, and baseless lawsuits . . . without probable cause and regardless of the merits of the claims asserted therein". The record reflects that the defendants filed nine (9) separate lawsuits directly, and covertly financed and controlled four (4) additional suits against the project. All thirteen were unsuccessful on the merits, most being summarily resolved against the defendants and their allies. Despite this dismal record, the proposed shopping center development has been stalled since the summer of 1973; and the pendency of appeals still

precludes the issuance of the municipal bonds necessary to finance acquisition of the project area.

Also despite this dismal record the District Court, *sua sponte,* ordered Hahn to show cause why its complaint should not be dismissed on the authority of the opinion of the Court of Appeals in the instant case. Following briefing and argument, the District Court entered an order of dismissal with leave to amend.

Applicant Clipper Exxpress (hereafter "Clipper") is engaged in the business of freight forwarding pursuant to a permit issued by the Interstate Commerce Commission (hereafter "ICC"). Clipper is plaintiff in *Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc., et al.,* a Sherman Act treble damage action also pending in the United States District Court for the Northern District of California. The complaint in that case alleges that Clipper and other regulated members of the Freight Forwarders Bureau (hereafter "FFB", a Section 5(a) Interstate Commerce Act rate bureau) experienced substantial loss of business to unregulated shipper associations in the late 1960's. In response, the FFB filed a tariff proposal with the ICC to substantially reduce the rates charged by freight forwarders and thereby permit them to compete more effectively with the unregulated associations.

The defendants, Rocky Mountain Motor Tariff Bureau (hereafter "RMMTB"), and its members carriers are alleged, *inter alia,* to have filed and prosecuted repetitive, sham protests before the ICC for the purpose and with the effect of frustrating and delaying the initiation of reduced, competitive rates.

The alleged result of this program of baseless, sham opposition before the ICC was a substantial loss of traffic and revenue arising from the delay in ultimate approval and implementation of the reduced tariffs.

The proliferation of legal and regulatory standards, the inherent costs and delays of the adjudicatory process, and the severe disruption and damage which may be inflicted upon one's competitors regardless of the ultimate outcome of a lawsuit have all contributed to the use of the courts as anticompetitive weapons. The prevalence of such abuse is reflected by the number of cases raising these issues in this Court and throughout the Federal Judiciary. The reasoning of the majority opinion in the court below denies that the United States Courts possess the power to protect themselves against such subversion and to redress private injury flowing from such abuse.

Wherefore, the Applicants respectfully pray that they be granted permission to file a brief *amici curiae* in support of the Petition before the Court, in order to present arguments and viewpoints on the matters involved which the parties will probably not present.

Dated, March 8, 1977.

Respectfully submitted,

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Respondents.

On Petition for a Writ of Certiorari

BRIEF OF ERNEST W. HAHN, INC. AND CLIPPER EXXPRESS AS AMICI CURIAE

QUESTION PRESENTED

Under what circumstances are conspirators or would-be monopolists liable under the Sherman Act for the use of the governmental adjudicatory processes to destroy competition?

INTEREST OF THE AMICI

Ernest W. Hahn, Inc. (hereafter "Hahn") is a corporation engaged in commercial real estate development including the development of retail shopping centers. In 1973, Hahn negotiated an agreement with the Urban Renewal Agency of the City of Santa Rosa, California (hereafter the "Agency"), to serve as the private developer of a regional shopping center as an integral part of a downtown renewal project in Santa Rosa. The Agency proposed to issue approximately fifteen million dollars of tax increment bonds to finance site acquisition and preparation of the project area. The issuance of a "no-litigation" certificate by the Agency's bond counsel was a prerequisite to the sale of the proposed bonds.

Hahn is the plaintiff in an action under the Sherman Act against a combination of Santa Rosa businesses which operate the only major shopping centers in the Santa Rosa area and also control several parcels of land earmarked for development as a regional shopping center. This group, aware of the preclusive effect litigation would have upon the financing of the urban renewal project, are alleged to have agreed to file a series of repetitive and baseless lawsuits for the purpose and with the effect of excluding Hahn from the market and thereby preserving their monopoly. Since April, 1973, the defendants filed nine (9) lawsuits and covertly financed and controlled four (4) other actions challenging the downtown project. All of these actions were decided against the defendants, most summarily. Nevertheless, the cumulative effect has been to delay the acquisition of the project area

and development of the competitive shopping center to the present date and the pendency of appeals continues to frustrate the issuance of the necessary municipal bonds.

The original complaint filed by Hahn was dismissed by the District Court for the Northern District of California on the authority of the Court of Appeals' decision in this case. A motion to dismiss the First Amended Complaint is currently pending.

Clipper Exxpress (hereafter "Clipper") is a corporation engaged in the business of freight forwarding under a permit issued by the Interstate Commerce Commission (hereafter "ICC"). It is plaintiff in an action under the Sherman Act which alleges that a motor carrier rate bureau filed repetitive, sham protests of tariff proposals filed by freight forwarders designed to reduce rates and permit forwarders to compete more effectively with unregulated shipper associations. The effect of that sham use of the regulatory protest mechanism was to delay for approximately two years the implementation of the reduced rates, causing substantial loss of traffic and revenue to Clipper.

A renewed motion to dismiss the *Clipper* action upon the authority of the instant case was denied by the District Court.

Amici are vitally concerned with their freedom to operate their business and to compete freely. They have no objection to valid governmental regulations governing the conduct of their business. But they believe it is essential that governmental processes of

adjudication not be subverted or abused by sham actions whose sole purpose is to destroy their ability to enter markets and compete fairly.

ARGUMENT

I. THE SUBSTANTIVE VALIDITY OF A CLAIM BASED UPON ABUSE OF THE ADJUDICATORY PROCESS IS ESSENTIAL TO EFFECTIVE ANTITRUST POLICY AND ENFORCEMENT

The antitrust laws in general, and the Sherman Act in particular, have been described by this Court as "the Magna Carta of free enterprise . . . as important to the preservation of economic freedom . . . as the Bill of Rights is to the protection of our fundamental personal freedom". *United States v. Topco Associates,* 405 U.S. 596, at 610 (1972). The Act is to be construed in a manner comparable to that applied to constitutional provisions, *Appalachian Coals v. United States,* 288 U.S. 334, 359-60 (1933), in order to reach all anticompetitive activities to the fullest extent permissible within constitutional limits. *Apex Hosiery Co. v. Leader,* 310 U.S. 469 (1940); *United States v. Frankfort Distillers, Inc.,* 324 U.S. 293 (1945).

In the early years of antitrust policy there were few opportunities for monopolization through misuse of governmental processes because governmental regulation of business was not as pervasive as it is today. The last several decades have witnessed an astounding proliferation of regulatory and remedial legislation governing market entry, conduct and performance by American business. These regulatory policies and

constraints, concerning such diverse aspects of business as competition, wages, hours, prices, discrimination, zoning, pollution and other environmental impacts of operation, are implemented by the courts and by myriad agencies, boards, and commissions. To enter a market and vie for the consumers' favor, businesses of all types must obtain and retain the approval of these regulatory authorities.

This profusion of governmental authorities protects the public in many ways, but it also creates virtually unlimited opportunities for abuse. The inherent costs, delay, and disruption of business planning often produced by litigation gives rise to the possibility that the mere persistent use of litigation will be employed by established and powerful businesses in strong market positions, either alone or in combination, to exclude competition or render market entry extremely difficult and costly.

This possibility was recognized by the Court when it enunciated the "sham" exception in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.,* 365 U.S. 127 at 144 (1961):

> "There may be situations in which a publicity campaign, ostensibly directed toward influencing governmental action is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified."

In two subsequent cases this Court had occasion to interpret and apply this exception in the context of

the adjudicatory functions of government. Thus, in *California Motor Transport Co. v. Trucking Unlimited,* 404 U.S. 508 (1972), the Court held that an alleged conspiracy of truckers to indiscriminately protest applications for operating rights before regulatory agencies "with or without probable cause and regardless of the merits of the cases", *id.* at 513, stated a valid claim for relief under the Sherman Act, because it effectively denied competitors access to the agencies and courts. The Court noted that there were "many other forms of illegal and reprehensible practices which may corrupt the administrative or judicial processes and which may result in antitrust violations", *id.* at 513, even though these practices in the context of the legislative or executive functions of government would be immune from antitrust sanctions.

In *Otter Tail Power Co. v. United States,* 410 U.S. 366, at 380 (1973), the Court interpreted its *California Motor Transport* decision as holding "that the principle of *Noerr* may also apply to the use of administrative or judicial processes where the purpose to suppress competition is evidenced by repetitive lawsuits carrying the hallmark of insubstantial claims and thus is within the 'mere sham' exception announced in *Noerr*". On appeal following remand the Court affirmed the District Court judgment that the power company's program of litigation violated the Sherman Act. *See* 417 U.S. 901 (1974). That program of litigation was designed and implemented to frustrate potential competitors' efforts to finance competitive facilities rather than to deny them ac-

cess to the courts or agencies. The insubstantial claims asserted by the defendant reflected an intent to abuse the judicial process and to create a direct restraint upon competition.

These decisions recognize that the judicial process and procedures are designed to justly resolve individual disputes on their merits as quickly and inexpensively as possible. Where parties initiate litigation, not for the purpose of obtaining a favorable decision on the merits, but rather to use the process and procedures to directly injure their competitors more than competition is injured. The judicial process itself is subverted and the discharge of the forum's mandate to do justice is frustrated. Where conspirators or would-be monopolists can so use the judicial process with impunity, respect for the integrity and impartiality of the courts is impossible to maintain. At the same time, the political values protected by the right to petition—access to government and free exchange of information—are absent, for the wrongdoers rely upon the *process,* rather than governmental *decision,* to exclude or injure competition. *Noerr, California Motor Transport Co.* and *Otter Tail* all recognize that under these circumstances such abuse of the judicial process for anticompetitive purposes should be subject to antitrust liability.

The disregard of these authorities by the majority opinion of the court below in the instant case, *Franchise Realty Interstate Corporation v. San Francisco Local Joint Executive Board, etc.,* 542 F.2d 1076, 1080-81 (9th Cir. 1976) is untenable; it was accom-

plished only by elevating trivial factual distinctions into determinative significance. Thus, the majority would limit the "sham" exception to publicity campaigns (*Id.*, 542 F.2d at 1080); the holding of this Court in *California Motor Transport Co.* to the widespread publication of threats of litigation having the effect of actual denial of access to the courts or administrative agencies (*Id.*, 542 F.2d at 1081), and this Court's holding in *Otter Tail* by first, denying any holding on this issue by the Court and second, *arguendo*, that the government's case depended upon "the fact that the defendant had used the threat of litigation as a bludgeon in its attempts to retain its monopoly . . ." (*Id.*, 542 F.2d at 1084).

The general rule derived by the majority opinion in the court below, *viz:*

> ". . . that defendants who engage in *Noerr*-protected lobbying activities may nevertheless subject themselves to antitrust liability if they engage in activities external to or abusive of the legislature or judicial process, which activities, like the threats of opposition in Trucking Unlimited, tend to harass and deter . . . competitors from having 'free and unlimited access' to (appropriate) agencies." (*Id.*, 542 F.2d at 1082 n.4)

is itself directly contrary to the holding of this Court in *United Mine Workers v. Pennington,* 385 U.S. 657 at 670 (1965) that genuine efforts to influence governmental action do not violate the antitrust laws "either standing alone or as part of a broader scheme itself violative of the Sherman Act".

Conduct either is or is not immune; and resolution of this question must turn on whether the effort to influence governmental action is *genuine* or merely *ostensible.* The critical issue is thus the intent or purpose for invoking governmental processes. Assuming in all cases arising under the *Noerr-Pennington* doctrine an underlying purpose to restrain or injure competition, did the actor intend to genuinely induce governmental acting having that result or did he intend to directly produce the result by the mere use of the governmental process and procedures? If the evidence shows the former, immunity should follow. If the evidence shows the latter, liability should be imposed both to protect competition and to punish the subversion of the governmental process.

II. THE HOLDING OF THE MAJORITY IN THE COURT BELOW LOGICALLY BARS ALL GOVERNMENTAL REGULATION OF THE ABUSE OF GOVERNMENTAL PROCESSES

This case does not involve Sherman Act liability alone. The reasoning of the majority, resting on constitutional grounds, logically forecloses all regulation of the manner in which or the purposes for which governmental processes are used. Given the general recognition of the fundamental importance of antitrust policy and enforcement, see *United States v. Topco Associates, supra; Perma Life Mufflers, Inc. v. International Parts Corp.,* 392 U.S. 134, 139 (1968); *Zenith Radio Corp. v. Hazeltine Research, Inc.,* 395 U.S. 100, 130-31 (1969), it is difficult to comprehend how antitrust liability can be denied, without destroy-

ing the court's power to apply common law tort sanctions (*e.g.,* malicious prosecution, abuse of process), punish for contempt of court, enforce doctrines concerning the finality of judgments or rules of procedure. If persons have a First Amendment right to use the adjudicatory process in any manner and for any purpose they choose, then rules of standing, procedure or finality which limit that right must be unconstitutional. Such a result is absurd yet logically mandated the decision of the court below.

III. THE SPECIAL PLEADING RULE ANNOUNCED BY THE MAJORITY IS CONTRARY TO THE FEDERAL RULES AND IMPOSSIBLE TO COMPLY WITH

In addition to its disregard of the governing substantive principles, the majority in the court below promulgated a rule requiring particularity in pleading liability based upon "conduct which is prima facie protected by the First Amendment . . ." 542 F.2d at 1082-83:

> "What we . . . hold is that in any case, whether antitrust or something else, where a plaintiff seeks damages or injunctive relief, or both, for conduct which is prima facie protected by the First Amendment, the danger that the mere pendency of the action will chill the exercise of First Amendment rights requires more specific allegations than would otherwise be required."

As Chief Judge Browning noted in dissent, this rule would apply to most antitrust actions, 542 F.2d at 1089. It would also apply in all defamation cases and

most litigation under the federal and state securities laws. *A fortiori* it would apply in suits sounding in perjury, contempt, extortion, tax evasion and many other areas of the law. Each of these is an area where "expressive activity" may result in liability. The possibility of being subjected to suit will create a "chilling" effect upon the potential defendant's exercise of his First Amendment rights of speech, press or petition. Liability in each of these areas, as under the "sham" exception to the *Noerr-Pennington* doctrine, turns upon the state of mind of the actor—"actual malice" in defamation or invasion of privacy cases [*New York Times Co. v. Sullivan,* 376 U.S. 254 (1964); *Time, Inc. v. Hill,* 385 U.S. 374 (1967)]; "scienter" in litigation under Rule 10(b)(5) of the Securities Exchange Act of 1934 [*Ernst & Ernst v. Hochfelder,* 425 U.S. 185 (1976)] "willful" and "deliberate" falsification of the areas of tax evasion and perjury. In each of these areas state of mind is a critical fact, yet Rule 9(b), Federal Rules of Civil Procedure, expressly provides that "[m]alice, intent, knowledge, and other condition of mind of a person may be averred generally."

Indeed, it is precisely because of the critical importance of purpose or intent in antitrust litigation that such rigorous standards are applied to motions for dismissal or for summary judgment in these cases. As this Court held in *Poller v. Columbia Broadcasting System, Inc.,* 368 U.S. 464, at 473 (1962):

> ". . . summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely

in the hands of the alleged co-conspirators and hostile witnesses thicken the plot."

Accord: Hospital Building Company v. Trustees of the Rex Hospital, ... U.S. ....., 48 L.Ed.2d 388 (1976).

The majority of the court below, recognizing the difficulty of proof in this area, apparently believes that the plaintiff should be denied an opportunity to develop such proof and the court spared the difficult task of ascertaining state of mind. This approach was only recently rejected by the Court of Appeals for the Third Circuit in *Ungar v. Dunkin Donuts of America, Inc.,* 531 F.2d 1211, at 1226 (3d Cir.), *cert. denied,* ..... U.S. ....., 97 S.Ct. 74 (1976):

". . . we are aware of no principle that courts will not inquire into state of mind where that is relevant; the fact that a given legal line is hard to draw does not excuse judges, and juries, as each case arises, from doing their best to draw it. Consider, for example, the problem of determining degrees of culpability: was the conduct 'intentional', 'knowing', 'reckless', 'willful'? These kinds of questions are metaphysical, perhaps, but it is the unfortunate province of the courts to struggle with them."

The approach of the majority of the court below should also be rejected in the instant case.

CONCLUSION

For the foregoing reasons, *amici* respectfully submit that both the substantive and procedural rules announced by the majority of court below in the instant case are contrary to governing authority and extremely destructive to antitrust policy and enforcement. *Amici* respectfully urge the Court to grant the Petition for a Writ of Certiorari in this case and correct those erroneous rulings. The requirements of effective democratic government as well as the effectiveness of antitruse enforcement require no less.

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Respectfully submitted,

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